

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

961
BRIEF FOR APPELLANTS AND JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,128

FLORIDA PRODUCTS, INC.

and

LIBERTY MUTUAL INSURANCE COMPANY,
Appellants,

v.

SUSIE CURRY and HERMAN ADLER,
Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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QUESTION PRESENTED

Whether in reversing the Deputy Commissioner's rejection of Appellee Curry's compensation claim, and upon that reversal granting summary judgment to her and denying summary judgment to Appellants, the trial court erroneously determined that the record did not support rejection of Appellee Curry's claim.

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered in favor of Appellee Curry upon a motion for summary judgment granted in her favor. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The complaint [JA 75], answers [JA 78, 82], motions for summary judgment [JA 83-6] and order of the court [JA 89] appear in the Joint Appendix.

STATEMENT OF THE CASE

This appeal is taken from an order of the United States District Court for the District of Columbia awarding summary judgment to the employee, Mrs. Susie Curry, and reversing the Deputy Commissioner's order rejecting her claim. The Workmen's Compensation proceeding was held on September 15, 1965, and arose as the result of Appellee Curry's claim that on or about September 1, 1964 she sustained an injury to her right knee which arose "out of and in the course of" her employment.

Facts:

On May 25, 1965, the claimant filed a Workmen's Compensation claim against her employer, Appellant Florida Products, Inc., in which she alleged that on or about September 1, 1964, she sustained injury to her right knee when a metal pot which she was carrying struck the knee as she slipped and fell on a slippery floor [JA 1]. This claim was controverted by the Appellants. It was their contention that the claimant did not sustain an injury as alleged but that her disability and resulting surgery were attributable solely to the natural progression of a degenerative osteoarthritic condition which existed long before September 1, 1964 [JA 5].

During the formal hearing before the Deputy Commissioner, the claimant testified that when she fell her right buttocks and hip struck the floor [JA 45]. She ultimately came to rest in a supine position [Tr. 130]. She held the pot throughout the fall, and according to her testimony, at some point it came in contact with her right knee [JA 40].

There were no witnesses to the actual fall. There were several witnesses to the fact that there was a noise, and subsequently pot and claimant were on the floor [JA 54]. One witness, Mrs. Brice, a co-worker, stated that the sound of the pot caused her to turn around and discover that the claimant had fallen on her buttocks with

the pot laying on the floor nearby [JA 33]. Another witness, Mr. Joe Williams, called by the claimant, testified he observed the claimant on her knees and not on her buttocks and back [JA 54].

The date upon which the accident occurred was also in doubt. Mrs. Curry testified that she fell a few days before Labor Day [JA 41]. Since Labor Day fell on September 7th, this would place the date of her fall on or about Tuesday, September 1st [JA 35]. However, Charles R. Lane, Mrs. Curry's immediate supervisor, testified that he observed her on the floor on a Friday afternoon several months before Mrs. Curry stopped working [JA 55]. She responded negatively to his inquiry if she were injured and continued to work on a fairly regular basis for a number of months [JA 56]. She never complained to him about being injured and he was first advised of her claim by a representative of Appellant Liberty Mutual Insurance Company [JA 57]. Mrs. Brice testified that what she observed occurred several weeks before Mrs. Curry stopped working [JA 35].

Shortly after the fall occurred, Mrs. Curry consulted her family physician, Dr. Montgomery [JA 42]. She was also seen by a Dr. Blackwell who, she states, x-rayed her knee and told her she chipped a bone [JA 42]. Dr. Blackwell then referred her to a Dr. Epps [JA 42]. Dr. Epps, according to the claimant, told her that nothing was wrong with her leg but instructed her to "go home and take an old pocketbook and put it on your leg." [JA 43]. Mrs. Curry denied ever having injured or received treatment for her right knee prior to September 1, 1964. She specifically denied that Dr. Montgomery ever treated her for arthritis of the right knee or for any other knee condition. [JA 52].

The claimant sought to relate her disability to her fall through the testimony of Dr. Samuel Jack Sugar. Dr. Sugar testified that he is an orthopedic surgeon and a

member of the staff of Providence Hospital [JA 6]. He first met Mrs. Curry professionally at the hospital after she was admitted as a "staff service patient" on November 10, 1964 [Tr. 109]. He did not receive a history of trauma from the patient upon her admission nor a past history of her arthritic difficulties in the right knee [JA 13, 20]. His initial diagnosis was "osteoarthritis of the right knee with loose bodies of the knee, chondromalacia of the patella and medial condyle of the femur, and chronic synovitis" [JA 8]. On November 11, 1964 Dr. Sugar performed an arthrotomy of the right knee, partial synovectomy, and an excision of cartilage from the condyle of the femur and kneecap [JA 9, 10].

Dr. Sugar had no independent recollection of ever receiving a history of trauma from the patient [Tr. 74]. He stated that this information was first given to him after the arthrotomy and was prompted by an inquiry by an insurance investigator [JA 21]. Dr. Sugar did not know the source of the information other than that it was prepared by his office. However, he testified that it was his practice to make a note in his records if a patient relates a history which suggests that it is a workmen's compensation case [JA 22]. Also in such instances, he would not ordinarily undertake an operative procedure without first having obtained permission of the insurance carrier [JA 23]. His records in this case were devoid of any reference to a work-connected injury [JA 26].

Dr. Sugar concluded that, assuming Mrs. Curry was injured as she claimed, and that that injury prevented her continued employment, it was his opinion that the injury aggravated the pre-existing arthritic condition causing some disability [JA 12]. Upon cross-examination Dr. Sugar admitted that none of the conditions he uncovered in claimant's knee was the result of trauma and that he could not state how long it took for the car-

tilage to calcify in the synovial membrane [JA 17]. In his opinion this calcification wouldn't have to be the result of any definite trauma and could have been the natural progression of Mrs. Curry's arthritic condition, totally unrelated to any traumatic injury of any sort other than the normal wear and tear. Dr. Sugar was unable to state with any degree of medical certainty what caused the condition of Mrs. Curry's right knee [JA 18]. Further, it was his opinion that the conditions which he observed were the result of a progressive disease and factors stemming from appellee's pre-existing osteoarthritis which had been going on at least six months prior to the November 11, 1964 surgery [Tr 211-212]. Dr. Sugar admitted that he could not say whether any of the calcified cartilage he removed from Mrs. Curry's knee was caused by any alleged falling of a pot on her knee [Tr 42], and that the operation which he performed upon her was not the type commonly associated with traumatic injuries but rather was one which is performed on patients suffering from a progressive osteoarthritic condition, such as the claimant. Dr. Sugar concluded his testimony by stating that if he had received a history of pain and discomfort for a month or two prior to September 1, 1964, he would certainly reevaluate his opinion and give consideration to the fact that her disability was caused by a bumping or twisting of the knee several months before the claimant's fall [JA 27].

Testimony contradicting the claimant's denial of a pre-existing arthritic condition and establishing a prior history of pain and discomfort was presented by Dr. Wilder P. Montgomery, a witness for the appellants. Dr. Montgomery has practiced internal medicine since 1949 and is certified by the American Board of Internal Medicine [JA 60]. He testified that he has treated the Appellee since 1949 [JA 60], and that Mrs. Curry first complained of arthritis in her right knee on April 11, 1964. On that occasion, Dr. Montgomery's examination dis-

closed no objective findings. However, she returned to him on June 27, 1964 with further complaints of pain in her right knee. Upon examination the knee was found to be painful and swollen [JA 61]. The Appellee returned again to Dr. Montgomery's office on July 18, 1964 and further complained of pain in the right knee [JA. 61].

Dr. Montgomery next saw Mrs. Curry on September 9, 1964. At that time his examination revealed that her right knee was stiff, painful and swollen [JA 62]. She gave no history of trauma [JA 62]. He continued to treat her until October 2, 1964, and at no time during his treatment did Mrs. Curry give him a history of trauma to her knee [JA 63]. It was Dr. Montgomery's opinion that the symptoms given by Mrs. Curry were those which are commonly associated with the normal progression of arthritis [JA 64]. He stated that those symptoms are generally present in a person with the claimant's condition in the absence of trauma [JA 64].

Dr. Charles Harry Epps, called as a witness for the Appellants, testified that he is a specialist in orthopedic surgery and certified as a Diplomate by the American College of Orthopedic Surgeons [JA 28]. He stated that Mrs. Curry was referred to him by Dr. Blackwell [JA 28]. He examined her on October 19, 1964 [JA 28]. At the time of his examination she complained of swelling which had persisted for approximately one month but had recently subsided [JA 29]. The patient gave no history of trauma nor did he receive a history of trauma from Dr. Blackwell [JA 29]. Dr. Epps diagnosed Mrs. Curry's condition as a chronic hypertrophic degenerative arthritis or synovitis of the right knee [JA 29]. X-rays were taken of the appellee's right knee and interpreted by Dr. Epps to be consistent with her age and that there were small spur formations at the margins which he felt represented degenerative arth-

ritic changes [JA 29]. In his opinion her symptoms were due to the degenerative arthritic changes [JA 29]. Dr. Epps did not recall receiving any history of traumatic injuries from the patient and stated that it was his normal practice to include a note in his records whenever a history of trauma is given to him by a patient [JA 30]. His records revealed no such history [JA 30].

The claimant's denial of any previous injury to her right knee was contradicted by an administrative file in the office of the Deputy Commissioner. The file contained a claim for compensation benefits brought by the claimant and based upon an injury to her right knee which she sustained when she fell off some cans upon which she was standing [JA 48-9]. The Attending Physician's Report indicated that the injury occurred on May 3, 1957, and that the claimant sustained a contusion of the interior-anterior aspect of the right knee with marked pain [JA 49, 50]. The x-ray was negative for fracture, although old arthritic lipping of the articular surfaces was demonstrated [JA 50].

On January 6, 1966, Deputy Commissioner Adler issued a compensation order rejecting Mrs. Curry's claim. His decision was in part based upon a finding that Mrs. Curry's condition and resulting disability pre-existed, and was independent from, her fall of September 1, 1964. He further concluded that:

the testimony of the claimant to substantiate her allegation of an injury to the right knee at the time of her accident was unreliable; that the conditions of her right knee which caused disability for [sic] work and required surgical treatment were the result of the natural progress of the degenerative arthritic disease; and that the claimant did not sustain any injury to her right knee, as alleged, when she fell on or about September 1, 1964. [JA 70]

Upon these findings of fact, the Deputy Commissioner rejected Mrs. Curry's claim [JA 70].

Proceedings below :

The Deputy Commissioner's order rejecting the claimant's claim for compensation was filed on January 6, 1966 [JA 71]. Appellee Curry then instituted proceedings for review and to set aside the order by filing on January 21, 1966 a complaint in the United States District Court for the District of Columbia under the authority of 33 U.S.C. § 921, Civil Action No. 157-66, styled Susie Curry, Plaintiff v. Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, Defendant [JA 75]. The Appellants intervened as defendants, and after the issues were joined, the parties filed motions for summary judgment [JA 83-6]. The trial court granted Appellee Curry's motion for summary judgment and denied Appellants' and Appellee Adler's cross-motions for summary judgment. The trial court held that the record before the Deputy Commissioner did not support his findings and that the plaintiff was entitled to judgment as a matter of law. He directed that the compensation order rejecting Appellee Curry's claim be set aside and the case be remanded to the Deputy Commissioner to determine the nature and extent of Mrs. Curry's disability [JA 89]. This appeal followed [JA 90].

STATUTES INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-950, made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600 (1928), D. C. Code §§ 36-501 to 36-502 (1961 ed.).

Sec. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy

commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

Sec. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District).

STATEMENT OF POINTS

1. The presumption of compensability was overcome by Appellants' substantial evidence that the claimant did not sustain an injury arising out of and in the course of her employment.

2. The findings of the Deputy Commissioner are supported by substantial evidence on the whole record and should be reinstated.

SUMMARY OF ARGUMENT

The presumption that a claim is compensable is operative only where the employer offers no substantial evidence that the claimant's injury is not work-related. In this action, the employer has overcome this presumption by offering substantial evidence through lay and expert witnesses which establishes that the claimant's testimony was not worthy of belief and that her condition and disability were solely attributable to degenerative osteoarthritis, a condition which pre-existed the alleged injury.

There was no witness to her fall. Those who were present gave conflicting accounts of what occurred. The Appellants offered evidence that the claimant suffered from an arthritic condition of the right knee since 1957; that for five months preceding the alleged injury she consulted regularly with and was treated by her family physician from osteoarthritis of the right knee; and that in the opinion of Appellants' experts, Mrs. Curry's condition and disability were attributable to the natural progression of degenerative arthritis, wholly unconnected with trauma. In addition, the Appellants repeatedly impeached the testimony of the claimant, and in particular her denial of ever having injured or received treatment for her right knee. These are material facts about which she could not have been mistaken. Thus the Appellants met their burden of going forward with substantial evidence to meet the presumption of compensability and the presumption is no longer operative.

Furthermore, the evidence offered by the Appellants to overthrow the presumption of compensability serves as the basis for the inferences drawn by the Deputy Com-

missioner that the claimant did not sustain an injury on September 1, 1964, as alleged, and that her conditions and disability are solely attributable to degenerative arthritis. The District Court thus was bound to accept those inferences regardless of whether it felt others were more reasonable or that the Deputy Commissioner's inferences were factually questionable. The inferences drawn by the Deputy Commissioner have substantial roots in the evidence and it was error for the District Court to grant Appellee Curry's motion for summary judgment and to set aside Deputy Commissioner Adler's order rejecting her claim.

ARGUMENT

- I. The claimant was not entitled to the benefit of the presumption of compensability after Appellants presented substantial evidence controverting her claim.

A. The Statutory Presumption

The statutory presumption of compensability is met when, as in the present action, the claim is controverted by substantial evidence. It does not acquire the attribute of evidence and cannot sustain the District Court's order in light of the Deputy Commissioner's rejection of the claimant's testimony as unreliable and the presence of substantial evidence in the record supporting his conclusion that her disability was not attributable to her fall on September 1, 1964.

Section 20(a) of the Longshoremen's and Harbor Workers' Act provides that in any proceeding for the enforcement of a claim for compensation, it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act. 44 Stat. 1436 (1927), as amended, 33 U.S.C. § 920 (a), made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600 (1928), D. C. Code

§ 36-501 (1961 ed.). The effect to be given this section has been carefully set out by the Supreme Court in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). There the issue was whether the claimant's death was accidental or suicidal. The Deputy Commissioner disallowed the claim based on a finding of suicide. The Court of Appeals *reversed*, holding that when the evidence was evenly balanced the statutory presumption must tip the scales in favor of the claimant. *Bowers v. Hoage*, 64 App.D.C. 226, 76 F.2d 996 (1935).

The Supreme Court reinstated the Deputy Commissioner's ruling and in so doing held the Court of Appeals had misinterpreted the function of the statutory presumption of compensability. The presumption, according to the Court, is meant to control in the absence of *any* evidence; that is when a claim is presented and nothing is offered to rebut the presumption that injury or illness occurring during employment was caused by that employment. However:

Once the employer has carried his burden by offering testimony sufficient to justify a finding of . . . [non-compensability], *the presumption falls out of the case*. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. . . .

* * * *

The statement in the Act that the evidence to overthrow the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by the evidence. [280 U.S. 286; Emphasis supplied.]

Therefore, when evidence is presented by both parties creating an issuable fact, the presumption is no longer operative.

In two recent decisions, both of which were relied upon below by Appellee Curry, this Court applied the rationale of the *Del Vecchio* decision. In *Howell v. Einbinder*, 212 U.S.App.D.C. 312, 350 F.2d 442 (1965), the question was whether the Deputy Commissioner's ruling, that leakage of an aneurysm resulting in claimant's death was not causally related to stress and strain involving decedent's work, was supported by substantial evidence on the whole record. The Court concluded that the Deputy Commissioner made *no* findings with respect to testimony of physical stress and strain due to claimant's work, nor did he consider the question of aggravation of a pre-existing injury. The ruling was not reversed, but was set aside and the case remanded for reconsideration of the issues. The statutory presumption continued to operate and required reconsideration because the analysis by the only medical witness who examined the decedent, that the injury was unquestionably caused by the strain of claimant's work, was not rebutted by any other medical testimony. Such is not the case in the proceeding in question here.

The second case, *Butler v. District Parking Management Co.*, 124 U.S.App.D.C. 195, 363 F.2d 682 (1966), involving the question of whether the schizophrenic reaction suffered by claimant arose out of his employment. The court correctly stated the function of the presumption:

This provision places the burden on the employer to *go forward* with evidence to *meet* the presumption that injury or illness occurring during employment was caused by that employment. [*Id.* at 197, 363 F.2d at 684; Emphasis supplied.]

The Deputy Commissioner's ruling was reversed based on the fact that:

The employer offered *no* substantial evidence that Appellant's injury was not work-related and hence

has not met the burden imposed by the statute. [*Id.* at 197, 363 F.2d at 684; Emphasis supplied.]

The presumption in *Butler*, therefore, compelled a decision for claimant as a result of defendant's failure to offer any substantial evidence to contravene the claim for compensation. See *J. V. Vozzolo, Inc. v. Britton*, — U.S.App.D.C. —, 377 F.2d 144 (1967).

In *Wolff v. Britton*, 117 U.S.App.D.C. 209, 328 F.2d 181 (1964), a widow filed a compensation claim to recover death benefits under the Compensation Act. The Deputy Commissioner found that the death "did not arise out of and in the course of" the decedent's employment. The District Court upheld that finding.

Just before quitting time, the decedent, while holding a pop bottle and discussing his work with his fellow workers, fell to his knees and clutched at his stomach with his hands. He then suddenly leaped upward and backward, falling onto the floor and striking the back of his head. He was taken to the hospital and released later the same day. The following day he lost consciousness and died two days later of a massive cerebral edema. The edema was due to a fracture of the skull which he sustained when his head struck the floor.

On appeal the widow argued that the presumption created by § 20 of the Act entitled her to an award. It was her testimony before the Deputy Commissioner that the decedent was injured when he caught his heel in some form of stool or creeper and fell over backwards striking his head on the concrete floor. This Court stated that without more, the appellant might have established her case. But the case was controverted and the appellees called witnesses as to situations within their knowledge which might have a bearing upon the decedent's physical condition. Other witnesses for the appellees testified in great detail as to the circumstances surrounding the de-

cedent's seizure and fall. The Court concluded that the Deputy Commissioner drew the inferences from all of the facts as found and that the injuries suffered by the appellant's decedent did not arise out of his employment. And since there is factual and legal evidence for that conclusion, "our task is at an end." *Id.* at 213, 328 F.2d 185.

In the present action there is more than sufficient evidence to support the employer's position that the claimant did not sustain an injury on or about September 1, 1964. This position is perhaps best supported by highlighting the evidence adduced at the hearing.

B. Substantial Evidence Refuting Appellee Curry's Claim:

Claimant asserts that the damage complained of was caused by a lightweight metal pot striking her right knee as she fell, during the course of her employment, on September 1, 1964 [JA 1]. In support of this contention, the claimant called upon Dr. Sugar, the doctor who performed the corrective surgery on that knee [JA 5]. In spite of the fact that the doctor stated it was his custom to record in his notes any time a patient gives a history of occupation injury, no such entry was made either upon claimant's examination or her admission to the hospital on November 10, 1964 [JA 13, 20]. Dr. Sugar has no recollection of receiving a history of trauma from the claimant [Tr 74]. The doctor diagnosed the claimant's condition as osteoarthritis of the right knee with loose bodies therein, chondromalacia of the patella, medial condyle of the femur and chronic synovitis, stating that each of these problems existed for at least six months prior to November 11, 1964 and need not have been the result of definite trauma [JA 18]. Dr. Sugar went on to state that the condition could have been accelerated by trauma or could have been the natural deterioration of a progressive disease. To connect her disability

with trauma it was necessary for him to *assume* that what the claimant said relating to her September 1, 1964 trauma and prior history was true [JA 13]. And had he received a history of pain and discomfort which preceded the alleged trauma by one or two months, he would very definitely have considered the possibility that her disability was attributable to something other than the September 1st occurrence [JA 27]. Thus the *sina qua non* of Dr. Sugar's opinion connecting the claimant's disability to her fall was his assumption that the facts of the *injury* related to him by Appellee Curry were true.

At the hearing Mrs. Curry specifically denied having sustained any injury to her right knee or that she was ever treated for arthritis of the knee prior to September 1, 1964 [JA 52]. This statement was contradicted by her treating physician, Dr. Montgomery, who testified on behalf of the appellants [JA 60]. He stated that Mrs. Curry complained of and was treated for degenerative arthritis of the right knee as early as April 11, 1964, five months before the alleged accident [JA 61]. She continued to complain of pain and swelling in the knee throughout that summer [JA 61]. And on September 9, 1964, eight days after the alleged injury, she returned to Dr. Montgomery's office for treatment and made no mention of the accident or any trauma [JA 62]. The first reference by claimant to the trauma did not occur until she presented a compensation form to the doctor in November, 1964 [JA 63]. It was the doctor's opinion that the symptoms were those commonly associated with the natural progression of arthritis [JA 64].

The record is replete with additional relevant evidence offered by the Appellants contraverting Mrs. Curry's claim. For example, Dr. Blackwell, who treated the patient after Dr. Montgomery, did not include a history of trauma to the right knee when he referred the claim-

ant to Dr. Epps [JA 30]. And when Dr. Epps took a history from the claimant and examined her on October 19, 1964, the claimant made no mention of an injury occurring on September 1, 1964 [JA 29]. It was his opinion that the patient suffered from chronic hypertrophic degenerative arthritis and synovitis in the right knee, dissociated from trauma [JA 30]. X-rays taken at the time of the examination demonstrated small spur formations at the margins which, according to Dr. Epps, represented degenerative arthritic changes [JA 29]. This finding was consistent with the claimant's age and the findings contained in Dr. Sugar's operative report [JA 29].

In addition to establishing that the claimant's condition was due solely to a progressive debilitating disease, the Appellants presented evidence that claimant had injured the right knee in 1957 when she fell from some cans upon which she was standing [JA 50]. Mrs. Curry denied that the fall occurred as reported or that the injury was to the right knee. However, it was conclusively shown, through a Workmen's Compensation Attending Physician's Report that in fact this was the manner in which the fall occurred causing damage to that same knee [JA 50].

The claimant's credibility is thus revealed as the probative factor in determining the compensability issue. Recognizing this, the Appellants introduced substantial evidence that her condition pre-existed the alleged injury and that her testimony was unreliable and not worthy of belief. Mrs. Curry was contradicted by her treating physician after stating that she had not been previously treated by him for arthritis. She challenged the medical competency of Dr. Epps by stating that he prescribed the application of an old pocketbook to the damaged knee [JA 43]. And she categorically denied previous injury to her knee notwithstanding the fact that the Bureau of

Employees' Compensation maintained a file which contained her claim for precisely such an injury. [JA 49].

Hence the evidence presented by the Appellants to controvert the claimant's claim of a compensable injury was substantial and sufficient to overcome the presumption created by § 20 of the Act. And in addition to overcoming the presumption of compensability, this evidence was of such a nature and weight as to support the Deputy Commissioner's findings that the claimant did not sustain a compensable injury, as alleged, on September 1, but that the condition of her right knee and the necessity for surgical intervention were caused solely by the natural progress of degenerative arthritis.

II. The Deputy Commissioner's findings that Appellee Curry's disability was not associated with trauma and due solely to the natural progression of osteoarthritis are supported by substantial evidence in the record and should be reinstated.

A. Scope of the District Court's Review.

The scope of review in an action of the Deputy Commissioner's order is quite limited for the Workmen's Compensation Act specifically provides that in a claim for compensation filed with the Deputy Commissioner "[he] shall have full power and authority to hear and determine the questions in respect of such claim." 33 U.S.C. § 919(a). His compensation order may be suspended or set aside only "if it is not in accordance with law. . . ." 33 U.S.C. § 921. The function of a court in reviewing a determination by the Deputy Commissioner was established by the Supreme Court in *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469 (1947). It was stated at 477-8:

In determining whether a particular injury arose out of and in the course of employment, the Deputy

Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. [Authorities cited.]

* * * *

It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner*, 326 U.S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers*, *supra*, 287 Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

Thus, the Deputy Commissioner alone is charged with the responsibility of selecting the inference which seems most reasonable and a court reviewing that decision must accept the inference he draws unless it is irrational or unsupported by substantial evidence on the record as a

whole. *J. V. Vozzolo, Inc. v. Britton*, — U.S.App.D.C. —, 337 F.2d 144 (1967). See also *O'Keeffe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Great American Indemnity Co. v. Britton*, 186 F.Supp. 938 (D.D.C. 1960). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197 (1938); *Avignone Freres, Inc. v. Cardillo*, 73 App.D.C. 149, 117 F.2d 385 (1940).

Where, as in the instant case, the major consideration in drawing the necessary inference is credibility, the aforementioned presumption of the Commissioner's correctness is strengthened by the fact that credibility determination of necessity requires personal appraisal of witness demeanor. A case so holding in this jurisdiction is *Great American Indemnity Co. v. Britton*, 186 F.Supp. 938 (D.D.C. 1960). There the court held it:

... may not set aside the inferences drawn by the Administrator from the evidence that he chose to believe, if such inferences are reasonably possible and have a rational basis. Again, *the Court may not review the credibility of witnesses, even if the record shows that the veracity of a witness has been impeached*. Due regard must be accorded the fact that the Court has only the cold, printed record before it, while the trier of facts had the advantage of seeing and observing the witnesses. [*Id.* at 941; Emphasis supplied.]

The Third Circuit considered many of the same issues which are presented here in the case of *Kwasizur v. Cardillo*, 175 F.2d 235 (3rd Cir. 1949). There the court was called upon to review a finding of fact made by the Deputy Commissioner that the injury which he found the employee suffered did not arise out of and in the course of his employment. The employee's testimony at the

formal hearing made out a case for recovery. His sole supporting witness was discredited upon cross-examination. Other evidence was offered which did not help the claimant's case.

The court, reviewing the evidence to that point, stated that:

Suppose the case had stopped right here and that no one else had offered any testimony. Could a finding by the Deputy Commissioner that the injury was not suffered in the course of employment be sustained? We think undoubtedly it could. As already stated, a corroborating witness's testimony was shot all to pieces in cross-examination and a reading of the foreman's testimony really does not strengthen Kwasizur's case. As for Kwasizur, himself, it could hardly be claimed that the Deputy Commissioner was bound to accept the truth of the story, even though it were not contradicted, if it seemed to him, as the trier of facts, an improbable one. We think, therefore, if no further testimony had been presented except that offered on behalf of the claimant, the finding against him could not be disturbed by a court. [*Id.* at 236-7.]

And in *Coscia v. Willard*, 257 F.2d 105 (2nd Cir. 1958), the claimant alleged that he had sustained an injury arising out of and in the course of his employment. While the claimant and a fellow employee were trying to lower a boom on a ship, an accident of some nature occurred and the claimant thereafter complained that he was unable to see out of his left eye. He testified at the hearing that he had been struck on the left eye by a wire cable and that his head had been thrown back against the mast. The testimony of two eye-witnesses, while inconclusive, was not inconsistent with the claimant's story.

The safety director to whom the plaintiff complained immediately after the occurrence, the physician who examined him a few minutes later, the physician who saw

him the following day, and one who examined him ten days later, all testified that the claimant had complained only that grease had entered his left eye, and that he had not mentioned being struck on his eye or head. The medical evidence as to whether there was or could have been a causal relationship between the accident and the loss of vision in the claimant's left eye was in conflict. However upon the assumption that the claimant's version of the nature of his accident was accurate, two of the medical experts testified that there was or could have been a causal relationship between the accident and the loss of vision.

The Deputy Commissioner found that while the claimant was employed as a longshoreman some grease from a wire entered his left eye but that his loss of vision in the eye was due to vitreous hemorrhage which antedated the date of the alleged injury. Accordingly, the Deputy Commissioner rejected the claim for compensation. The District Court reversed the Deputy Commissioner's findings. On appeal, the Court of Appeals affirmed the Deputy Commissioner's findings. It stated that it was his exclusive function to assess the credibility and reliability of the witnesses. And it was for him alone to determine what permissible inferences to draw from the facts. "In setting the order aside the District Court, therefore, exceeded the permissible scope of judicial review. . . . In view of the humanitarian purpose of the Longshoremen's and Harbor Workers' Act and of Coscia's present physical condition, this conclusion has not been easily reached. But if the integrity of the administrative process is to be preserved in this case, the Deputy Commissioner's order must be upheld." [Id. at 107-8]

There is no need to again recount all of the evidence supporting the inferences drawn by the Deputy Commissioner in rejecting the claimant's claim. The only testimony which could connect the claimant's fall to an injury

and her subsequent disability was that of the claimant herself. The Deputy Commissioner, as the trier of fact, found her testimony to be unreliable and disregarded it in concluding that she did not sustain an injury on September 1, 1964. That finding must be upheld if the administrative process is to have any meaning.

Furthermore, his conclusions that the claimant's disability and need for surgery to the right knee were the result of the natural progression of a degenerative arthritic disease not causally related to the employment must also be upheld. There is overwhelming support for those conclusions in the testimony of Doctors Montgomery, Epps, and indeed in the testimony of Dr. Sugar.

CONCLUSION

For the reasons stated, the order of the Deputy Commissioner rejecting the claimant's claim is supported by substantial evidence on the whole record. Therefore, the order granting Appellee Curry's motion for summary judgment and denying the Appellants' and Deputy Commissioner Adler's motions for summary judgment should be reversed and the order of the Deputy Commissioner reinstated.

Respectfully submitted,



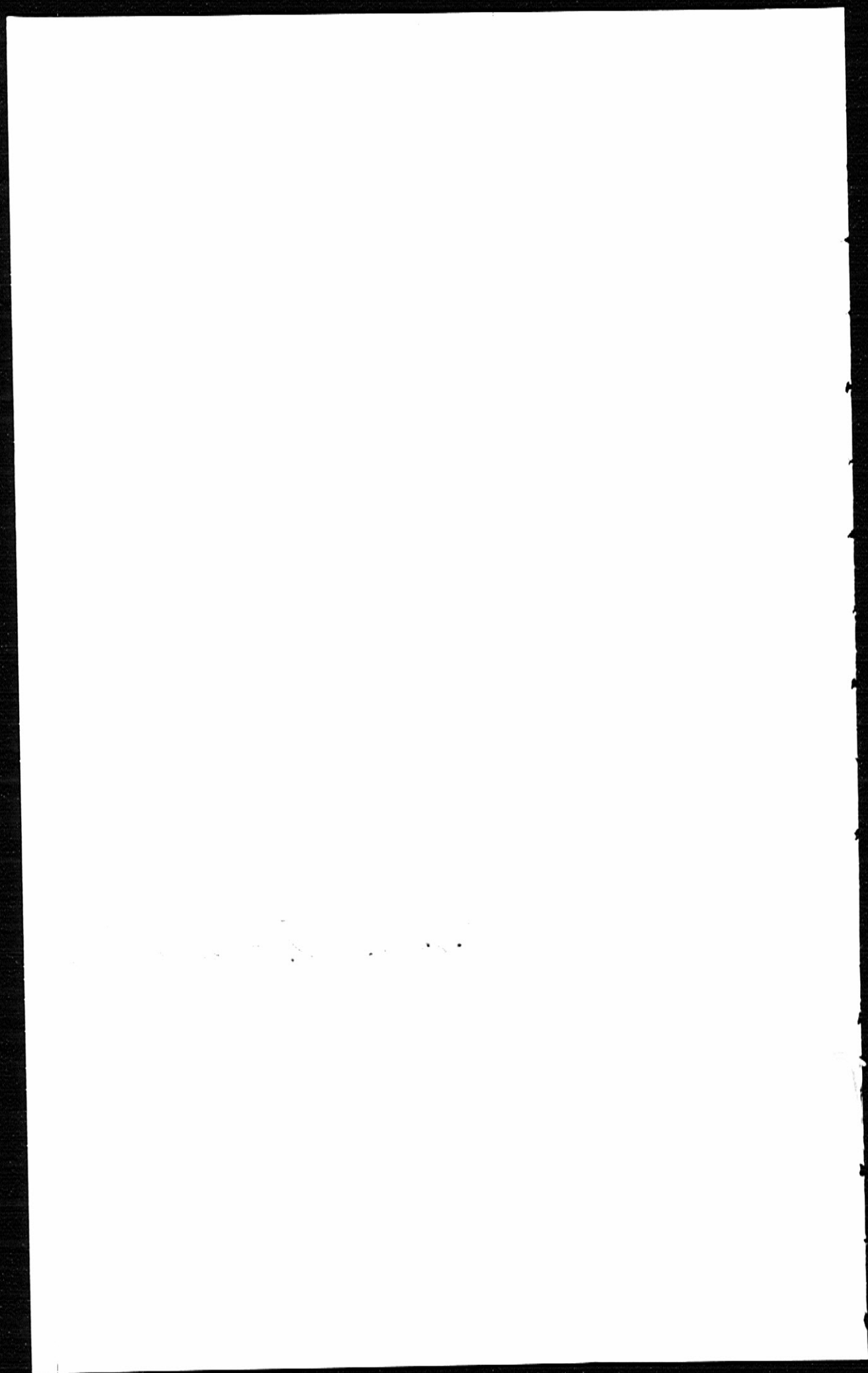
JAMES A. HOURIHAN
815 Connecticut Avenue
Washington, D.C.

Attorney for Appellants

Of Counsel:

HOGAN & HARTSON
Washington, D.C.

APPENDIX



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Deputy Commissioners Exhibit No. 1

243

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

OFFICE OF DEPUTY COMMISSIONER
WASHINGTON, D.C.

LEAVE THIS SPACE BLANK

CASE No. _____
INSURANCE
CARRIER'S No. _____

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed in duplicate with the Deputy Commissioner in accordance with sections 13 and 19 of the Act)

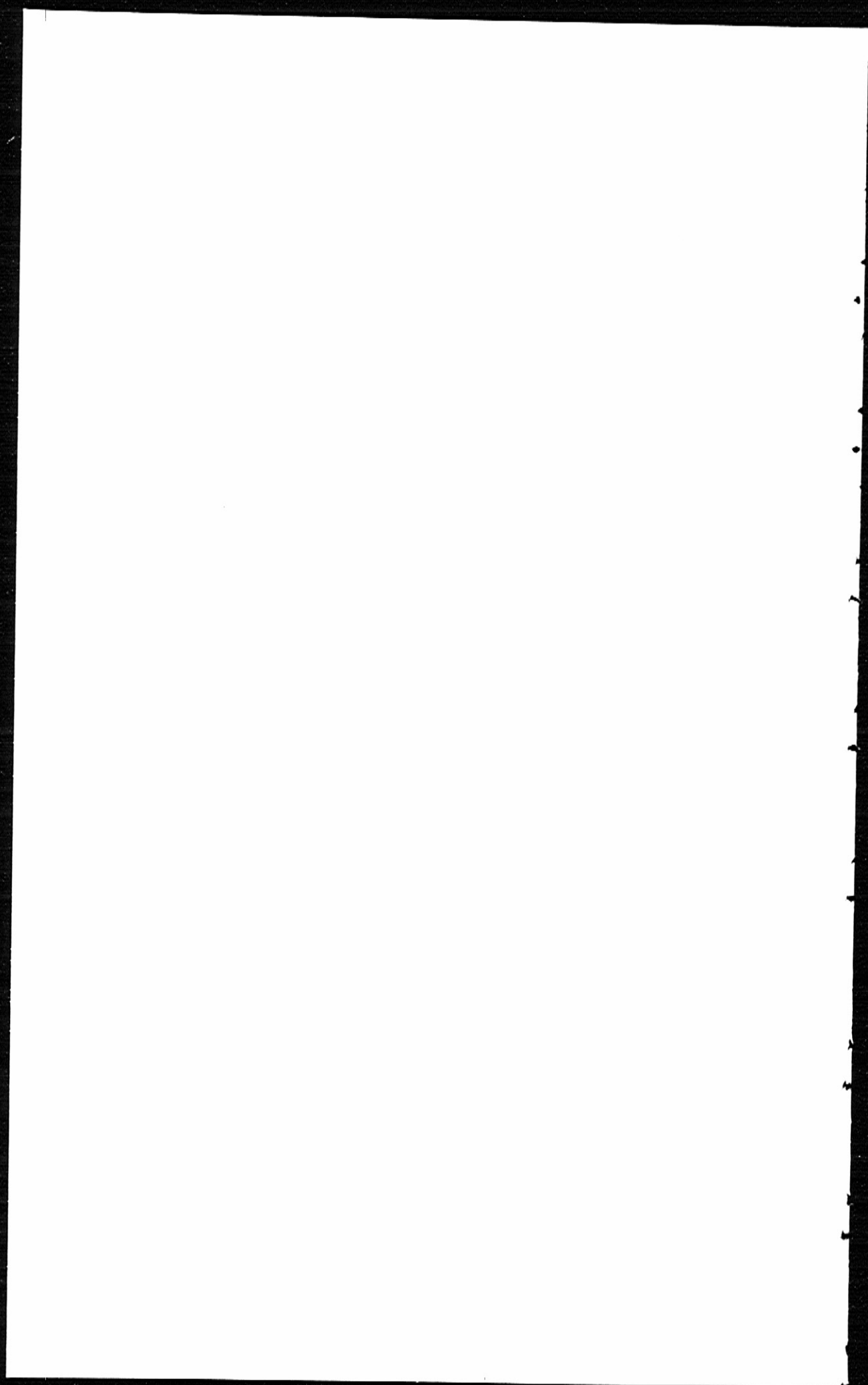
1. Name of employee Susie Curry Employee's Check No. _____
2. Address: Street and No. 3607 11th St. NW City or town Washington, D.C.
3. Sex F. Age 55 Married, single, widowed Married
4. Are you a U. S. citizen? (Yes or No) Yes Social Security No. 579-16-7230
5. State regular occupation Packer
6. What were you doing when injured? Working
7. (a) Wages or average earnings per day, \$ _____ (Include overtime, board, rent, and other allowances.) (b) Per week, \$ 50 (c) Were you employed elsewhere during week in which you were injured? No (d) If so, state where and when There was a raise around the time I was hurt, and it may be that weekly wages were more than \$50.
8. Employer Florida Products Co., Inc.
9. Office address: Street and No. 57 N. St. NW City or town Washington, D.C.
10. Nature of business _____
11. Place where accident occurred 57 N. St. NW
(Give workplace and name of vessel)
12. Name of foreman Mr. Pete Lane
13. Date of accident or first illness, the approx. day of Sept. 1, 1964, at _____ o'clock P.M.
14. How did accident happen or how was occupational disease caused? I had washed a big pot and was carrying it back to the heater. The floor was slippery, and I fell. The pot hit my right knee.
15. State fully nature of injury or occupational disease Injury to right knee
16. On what date did you stop work because of injury or disease? I believe it was 9/8/64
17. Were you paid full wages for the day on which you stopped work? (Yes or No) Yes, I think
18. Have you returned to work? (Yes or No) No If "yes," on what date? _____, 19____
19. Does injury or disease keep you from work? (Yes or No) Yes
20. Have you done any work in period of disability? (Yes or No) No
21. Have you received any wages since becoming disabled? No (Mr. Lane sent me \$20)
If so, from and to what date? _____
22. Has injury or illness resulted in amputation or other permanent disability? Yes
If so, describe same My leg is stiff, painful, and I have to use a cane.
23. Did you request your employer to provide medical attendance? Yes Has he done so? No
24. What is your claim? Compensation
25. Have you given your employer notice of injury? (Yes or No) Yes When? _____, 19____
26. If such notice was given, to whom? Mr. Lane & his brother saw me fall
27. Was it given orally or in writing? orally

I hereby make my claim for such compensation for disability as I may be or become entitled to under the Workmen's and Harbor Workers' Compensation Act by reason of the disability above identified.

May 25, 1965

Signed by Susie Curry Claimant.

Mail address _____



[4]

PROCEEDINGS

THE DEPUTY COMMISSIONER: * * *

From the information in the informal administrative file it appears that on May 27th, 1965, Mrs. Curry filed claim against the Florida Products Company, Incorporated, 57 N Street, Northwest, Washington, D. C., for compensation under the District of Columbia Workmen's Compensation Act, alleging that on or about September 1st, 1964, while performing the duties of her employment as a packer at an agreed average weekly wage of \$50 and while carrying a large pot, she sustained injury resulting in her disability when she slipped and fell causing the pot to strike her right knee, as a consequence of which she suffered trauma to the said knee.

The employee's claim for compensation will be placed into the record as the Deputy Commissioner's Exhibit Number One.

* * * *

In this hearing the Claimant will be represented by Attorney Hyman J. Cohen.

Mr. Cohen, what are the items of compensation [5] claimed?

MR. HYMAN: The usual items, Commissioner.

The employee has not worked since September 8th, '64. She was treated by a Dr. Blackwell. Then there were—Dr. Blackwell sent her for x-rays, and there were, I think two doctors in there before she got to Providence Hospital.

THE DEPUTY COMMISSIONER: All right.

You say she hasn't worked since September 8th, '64. Is that an inclusive date?

MR. COHEN: An inclusive date?

THE DEPUTY COMMISSIONER: It's an inclusive date?

MR. COHEN: Yes.

THE DEPUTY COMMISSIONER: In other words, what you are claiming is total disability beginning September the 8th, 1964?

MR. COHEN: This is correct.

THE DEPUTY COMMISSIONER: Now, total disability is claimed from that date to what date?

MR. COHEN: To the present and continuing into the future.

THE DEPUTY COMMISSIONER: All right.

So there is a claim, then, for temporary total disability from September 8th, '64 to the present and continuing.

Are there any other claims?

[6] MR. COHEN: There is every indication that the injury will be permanent. There is no—as yet no indication that there will be a recovery.

THE DEPUTY COMMISSIONER: Do you have any claim for any medical expenses?

* * * *

MR. HALLECK: Mr. Adler, if I can interrupt, in the event compensation is found to be coming to this lady, the carrier will agree to pay the cost of reasonable medical expense.

THE DEPUTY COMMISSIONER: All right.

Under the circumstances, then, I don't think it will be [7] necessary for you to enumerate the physicians or the items of expense.

* * * *

THE DEPUTY COMMISSIONER: That's right.

Mr. Halleck has just indicated that if it is found that the claimant had an injury which is related to her disability, the carrier will be agreeable to pay for the reasonable cost of the treatment for the injury and the related disability.

MR. COHEN: That is usual, as I understand it. We can save time that way.

THE DEPUTY COMMISSIONER: That's right.

However, the employer and the employer's insurance carrier, the Liberty Mutual Insurance Company, have controverted the claim.

The employer and the carrier will be represented in this hearing by Attorney Charles W. Halleck.

* * * *

MR. HALLECK: * * *

[8] We raise the issue of the extent of disability, and we raise the issue that the injury or the disability which this lady may suffer from is in no way related to any accident arising out of or in the course of her employment.

* * * *

[9] MR. HALLECK: I'll stipulate that the average weekly wage was \$50.

THE DEPUTY COMMISSIONER: Inasmuch as Mr. Halleck has mentioned that, is there any question about the wages of \$50?

* * * *

[10] As the result of an off-the-record discussion, both parties indicate that they agree that the wages at the time of the injury were \$50.

* * * *

As the result of an off-the-record discussion, the parties stipulate that the average weekly wages at the time of the injury were \$50.

* * * *

[11] SAMUEL JACK SUGAR

was called as a witness by and on behalf of the Claimant
* * *

* * * *

THE WITNESS: Samuel Jack Sugar. My present office address is 6201 Riverdale Road, Riverdale, Maryland.

* * * *

THE DEPUTY COMMISSIONER: Dr. Sugar, if you will tell us just briefly that you are licensed to practice medicine in the District of Columbia. Is that correct?

[12] THE WITNESS: Yes.

* * * *

THE WITNESS: The date of my license to practice in the District of Columbia is in February 1937.

THE DEPUTY COMMISSIONER: All right.

And since that date you have been in the active practice of medicine. Correct?

THE WITNESS: Yes.

* * * *

THE WITNESS: I have a specialty of orthopedic surgery.

THE DEPUTY COMMISSIONER: Are you a diplomate of the Board of Orthopaedic Surgeons?

THE WITNESS: Yes, I am.

* * * *

THE WITNESS: Since 1948.

* * * *

[14] BY MR. COHEN:

Q Doctor, is it fair to say that you see just about as many orthopedic patients at Providence and elsewhere as any other orthopedic specialist in the area?

A Yes, sir.

* * * *

[16] BY MR. COHEN:

* * * *

Q And do you have records concerning Susie Curry, the claimant here?

A I have some records.

As a rule, I do not make any private records on patients I see as staff service patients.

Q I see.

A Because the doctor who takes care of the staff service patients does not get paid for that service. So I do not make private records.

At the time I first saw her, after it became apparent that this might be a compensation case, my office staff got the information together, probably from the hospital records.

* * * *

[17] Q And you gave an accurate and complete description of the nature and the extent of the injury, did you not?

A Insofar as possible at that time.

Q And you stated—Of course, the report speaks for itself—But you gave the date of the accident as approximately September 1, 1964.

But you did not see her until November 10th, is that correct?

A Well, I'm not sure. I probably saw her before that at the orthopedic clinic—

Q I see.

A —at Providence Hospital.

Q I see.

A I did not make a record of it, at that time.

* * * *

THE DEPUTY COMMISSIONER: * * *

[18] Dr. Sugar, as far as your record is concerned, or as far as you are able to testify, you got a history from the claimant that she was injured on or about September the 1st, 1964. Is that it?

MR. HALLECK: Now, wait a minute. I'm going to object to the question in that form, Mr. Commissioner, and the reason I do it is this.

The Doctor has just testified that he did not make any private records and it was only after—at some later date when it became apparent that this might be a compensation case that his office staff put together some records.

Now, that being so, these are not records which are kept regularly, and any history or anything else that is brought together at this late stage was not put down by this Doctor contemporaneously with having received it.

THE DEPUTY COMMISSIONER: Well, let's ask the Doctor.

How did you arrive at a September 1st, 1964 date? Is that the result of the initial record you kept, or is that the result of an observation made from other data, from other records?

MR. HALLECK: Again I object to your question.

He hasn't said anything about a September 1st date. You have said it. He didn't.

* * * *

[19] THE DEPUTY COMMISSIONER: All right.

Can you tell us what history you got from her?

THE WITNESS: The history was that, at the time she was admitted to the hospital on November 10th, that she had injured her right leg about two months before.

* * * *

BY MR. COHEN:

Q And when you saw her, what did you treat her for?

[20] A You mean what I found at the time?

Q That is correct.

A I found she had some limitation of motion of her right knee, and it was also swollen and painful.

Q Did you make a diagnosis?

A Yes, I did.

Q What was that diagnosis, please?

A Osteoarthritis of the right knee with loose bodies of the knee, chondromalacia of the patella and medial condyle of the femur, and chronic synovitis.

Chondromalacia means softening of the cartilage, the joint cartilage of the kneecap and the femur.

Q And what did you do for the patient?

A She was admitted to Providence Hospital and surgery was performed on the knee.

Q Would you tell us just a little bit more about that?

A The surgery that was done is called an arthrotomy of the right knee, partial synovectomy, and excision of cartilage from the condyle of the femur and the kneecap.

And a partial synovectomy is removing part of the synovium or inside lining of the joint.

Q And how long did you continue to treat the patient?

A Well, she was discharged from the hospital—I saw [21] her while at the hospital until she was discharged on November 25th, 1964. That was two weeks after the surgery.

After that she returned to the clinic for followup. I don't have any records on that.

Q And what was her condition when you last saw her?

A When she left the hospital, of course there was still some swelling of the knee and limited motion, which is normal following that type of surgery.

Q That is, you had completed an operation and after the operation she still had limited motion? Is that correct?

A Yes, that's correct.

* * * *

When you first saw the patient, was she disabled?

A Yes, she was.

Q And your opinion as to the cause of her disability?

A It was the—this condition of her knee, the arthritis, the chondromalacia and the chronic synovitis.

* * * *

[22] BY MR. COHEN:

Q Now, your opinion, Doctor, as to the relationship between the injury concerning which you have testified and the disability?

A Well, I assume that my patients are always honest in their giving their reports—in giving their history.

Assuming that, that she was not disabled and was able to work until the time of the injury, I therefore feel that the injury aggravated the pre-existing condition to such an extent that it caused her some disability.

Q Are you saying this, Doctor, that on the basis of [23] her having worked until the time of the injury concerning which you obtained a history and then being unable to work and then coming to you with the condition that you observed, that your conclusion was that the disability resulted from the injury she received?

A Yes, from the aggravation of the pre-existing condition by the injury.

Q And so far as you know, she had worked until the time of the injury which aggravated the pre-existing condition.

* * * *

Q I'm going to read to you some symptoms from a report of Dr. Everett J. Gordon, who is an orthopedic physician, which symptoms he noted at an examination on November 10.

By the way, what was the date of your operation, Doctor?

A November 11.

Q I want to change what I just said.

He noted at an examination on November 9.

And the symptoms he noted were that the patient showed great difficulty in walking on the right leg, hobbling along very slowly. VP 14894. No effusion of the right knee. Some thickening as compared to the left knee, [24] mostly in the suprapatellar area, measuring 16 and $\frac{1}{8}$ th inches on the right against 15 inches on the left.

Slight atrophy of the right calf, 12 and $\frac{1}{2}$ inches against 12 and $\frac{3}{4}$ inches on the left at the same level.

At the mid-patellar level the right knee is 16 inches in circumference against 14 and $\frac{3}{4}$ inches on the left.

11 A

Has a 10 degree flexion contracture of the right knee; lacking 10 degrees of full extension.

Motion on the right is from 10-110 degrees against 0-145 degrees on the left.

Some relaxation of the medial collateral ligaments on the right; no relaxation of the cruciate ligaments.

There is a doughy feel in the suprapatellar area, but no frank joint effusion.

Patella is immobile and partially fixed on the right. Much more mobile in the left knee.

Has tenderness over the lateral margin of the patella. No tenderness over the medial or lateral joint space, although there is some sensitivity medially over the femoral condyle.

No definite popliteal mass, although there is some increase in the fatty masses in the popliteal fossae bilaterally.

[25] Right knee: Narrowing of the medial joint space, spurring of the superior-inferior margins of the patella, some cystic formation in the patella.

The patella appears to be adherent to the femoral condyle.

Spurring medially and laterally, tibial condyle, slightly larger spurs medially.

Some calcification and thickening in the parapatellar soft tissues.

There are some small calcified bodies in the lateral portion of the joint space and in the parapatellar area, more medially than laterally.

Providence Hospital, October 23, 1964.

Evidence of small bone fragments in the knee joint in the articular area, mostly in the suprapatellar recess, apparently representing joint mice; some osteochondritis dissecans, degenerative osteoarthritis and osteoporosis noted, possibly some effusion and synovial reaction.

* * * *

[26] BY MR. COHEN:

Q Are those symptoms consistent with your observations and your knowledge of the patient's case?

[27] A Yes, they are.

Q And based on all of that, is it your conclusion that the injury concerning which you have testified aggravated a pre-existing condition?

A Yes, it is.

Q Doctors, Dr. Sugar, and we lawyers, who are sometimes amateur doctors, use the phrase trigger.

Would it help, would it be a little—Would it dramatize or be graphic to say, to compare it to a trigger that started the aggravation of the pre-existing condition?

A Yes.

Q In other words, the injury would be the trigger?

A I'd say the injury triggered the aggravation of the process that was pre-existing, or speeded up the increase in the symptoms that she may or may not have had at some later date.

Q With the result that the patient after this triggering incident became disabled.

A Yes, sir.

Q As a result of the triggering incident, became disabled?

A Yes, sir.

Q Whereas, even in spite of—With the existence of those pre-existing conditions she was able to do her work.

* * * *

[28] Q Although she became disabled after the injury, whereas prior to the injury, even though there was a condition which existed, she was able to do her work before the injury.

* * * *

CROSS EXAMINATION

BY MR. HALLECK:

Q Doctor, what sort of an injury did she have?

Would you describe for me this injury that Mr. Cohen has been asking you about?

A At the time I originally saw her I got no history of the type of injury.

* * * *

Q Do you recall ever taking a history from this lady?

A I can say I probably did when I saw her in the Clinic, but I don't recall it.

* * * *

Q So you don't know what type of injury we're talking about?

A Only what was found out later.

[29] Q Well, what was found out later and found by whom?

A I presume it was my office staff that found it out. I don't know whether they got it from the hospital records or where.

Do you still want it?

Q But you didn't, you didn't take any history from her. Whatever you have there in those records was taken by somebody at some later date.

A I have no indication that I took this history from her. Unless I could see the hospital clinic records I couldn't be sure.

Q So when you're talking about the injury she had aggravating a pre-existing condition, how are you able without knowing what the injury was to tell us whether or not it aggravated the condition?

A I said before I assume that my patients are honest in what they tell me, and the fact that she was working up until the time she received this injury.

There are a number of different types of ways of injuring a knee that will aggravate a pre-existing condition.

Q There are all manner of ways of doing it, aren't there?

A Yes, sir.

* * * *

[31] Q Do you recall any history of any other injury back a year or so before that, or ten years before that?

A No, I don't.

Q Could it have been given to somebody in the hospital and you not have a recollection of it?

A Yes, it could have been.

Q Now, you don't know the nature of the injury that she complained of, is that correct?

A Only what I obtained later.

Q What did you obtain later?

A That a big pot fell and hit her on the knee.

Q A pot fell and hit her on the knee?

A Yes.

* * * *

Q And do you know who made those notes or got that information?

A No, I don't.

* * * *

[32] Q Doctor, would you look at Dr. Gordon's report which has been handed to you, and about half of which has been read, down under the prognosis part of the report where Dr. Gordon says: I do not believe her present condition is related to any occupational injury, as if she had suffered a definite injury to the right knee sufficient to have caused the present condition of her knee, then she would not have been able to work for two weeks.

Furthermore, the original doctor who saw her two weeks after injury apparently was not impressed with the severity of the injury as he did not order x-rays at that time.

It was some six weeks later after the alleged incident
* * * that x-rays were made.

In my opinion she has a degenerative condition in the right knee which is not related to trauma.

Surgery appears to be indicated because of the natural progression of the disease process.

* * * *

[33] Now, do you agree with Dr. Gordon's prognosis and the statements that he makes in there?

A I disagree with parts of it, and I agree with parts of it.

MR. COHEN: * * *

* * * *

Dr. Sugar, this witness, couldn't possibly agree with alleged historical statements in there, because Dr. Sugar has no knowledge of that.

The—many of these statements are gratuitous.

* * * *

[34] THE DEPUTY COMMISSIONER: Maybe it might be better not to burden Dr. Sugar to sit here and kind of evaluate Dr. Gordon's report.

In the first place, Dr. Sugar, let me ask you this, from the examination disclosed by this report that you have been reading which apparently is not part of your record [35] it appears that that spells out the same diagnosis that you made.

Is that correct?

THE WITNESS: That's right.

* * * *

[36] BY MR. HALLECK:

* * * *

Do you agree with the part of the report which I just read to you, the prognosis part?

A I agree with portions of it, but not all of it.

Q Now, do you have any reason to believe that the description contained therein of how this lady was injured is anything other than accurate, assuming that she was injured in that fashion.

[37] A No. I have no reason to disagree with it except that—My history would fit in with that.

Here it says she didn't actually fall on her knee but actually fell backwards. The history I got was that a pot fell on her knee.

One does not preclude the other.

Q Now, Doctor, if she were able to work for a period of time after this injury, would that—after this alleged injury, would you agree that that would not be an indication that the alleged pot falling on her knee caused the difficulty which she complained of when you saw her?

A No, I can't agree with that. Because the injury could be the trigger that starts the process, and the process can be slow and be aggravated. It does not have to be rapid.

Q What did you find when you operated on her? What did you find in the knee?

* * * *

[38] A Well, I seem to have a recollection that there were some loose bodies there.

The—I found softened cartilage and a thickened synovium or lining of the joint, with these calcifications and loose bodies in the thickened synovium or lining of the joint.

Q What is the synovium, Doctor?

A That's the inside soft tissue lining of the joint, which is where there is no cartilage.

Q You found that to be irregular, did you not, thickened in areas?

A Thickened, yes.

Q And swollen in some other areas.

A Yes.

THE DEPUTY COMMISSIONER: Is that the synovial membrane?

THE WITNESS: The synovial membrane, yes, sir.

BY MR. HALLECK:

Q Now, that was not as a result of the trauma, was it, Doctor?

A No.

That, I feel, pre-existed her injury.

Q That's a chronic condition which builds up and [39] builds up and builds up and it is seen quite often in a woman of Mrs. Curry's age, is it not?

A I wouldn't say quite often. But we can see it at any age with arthritis or even just following an injury.

Q Now, the loose bodies that you spoke of in your operative report, Doctor, what were those loose bodies?

A Those were the—They were actually in the synovial membrane, these calcifications of cartilage, calcified cartilage it appeared to be.

Q How long does it take that cartilage to calcify, Doctor? To produce bodies like you found.

A It varies.

* * * *

Q Well, have you any way of knowing how long it took those bodies to form in the cartilage in Mrs. Curry's knee?

A No, I haven't.

[40] Q It could have taken a year?

A Yes.

Q It could have been the result of an injury, say a year ago? Or a year prior to the time you operated?

A Well, it wouldn't have to be the result of any definite trauma.

Q It could just be a natural progressive—

A Progress of the condition.

Q Of the condition, totally unrelated to any traumatic injury of any sort.

A Yes. Any other than the normal wear and tear.

Q And you have no way of knowing whether or not that's what happened in Mrs. Curry's knee or whether it was the accident which resulted in her being bumped on the knee or having a pot fall on the knee?

A That's right, I couldn't state for certain.

Q Now, Doctor, you say in your operative report that the condyle, femoral, and the patella, and particularly on the posterior aspect of the patella—That's the kneecap, isn't it?

A Yes, that's right.

Q —were quite irregular and the cartilage covering these bony surfaces was destroyed in areas where the bone was quite visualized.

* * * *

[41] BY MR. HALLECK:

Q Now, Doctor, in the—where I mentioned the condyle, femoral (sic), and the kneecap, where they were [42] irregular and the cartilage destroyed, was that also as a result of a progressive disease factor from the osteoarthritis?

A Yes, sir.

Q And you have no way of knowing whether that had been going on for six months or a year or anything else, do you? Or any other length of time?

A Well, from what I found there, it had been going on at least six months.

Q And you have no way of telling from what you took out of there or from what was examined by the pathologist whether any of that was caused by any alleged falling of a pot on this lady's knee, do you?

A No, I couldn't say.

Q Now, Doctor, after you performed this operation, to the best of your knowledge did Mrs. Curry have an uneventful recovery?

A To the best of my knowledge; insofar as this type of condition, I assume she had the usual recovery.

Q What does a surgeon in your specialty that performs an operation like this, what sort of a recovery do you expect from an operation like this?

A I would expect her to be slow in getting motion back, and usually they do not obtain full motion.

Q Approximately how much reduced motion would you [43] expect her to have, percentage figures?

A That's difficult to say. It varies, I'd say, with the individual and the amount of damage that was present.

* * * *

Q Is this the same sort of operation, for example, that they perform on football players—

A No, sir.

Q —people who bang up the cartilage in their knees or is this something entirely different?

A It's entirely different.

Q This is related to arthritis, is it not?

A Yes, sir.

Q Do you have any idea how long Mrs. Curry has been suffering from this progressive osteoarthritis?

A There is no way I could estimate it.

Q Am I correct in saying that it is a progressive osteoarthritis?

[44] A Yes.

But sometimes the progression stops at a certain point and does not continue.

Q There is no indication that that is what happened in Mrs. Curry's case, is there?

A No.

Except that she had been working up to a certain point.

Q Well, do you know exactly how long she worked after this alleged injury occurred?

A I do not know exactly.

* * * *

BY MR. HALLECK:

Q If she worked two or three or four or five weeks—
THE DEPUTY COMMISSIONER: If you have an
objection,—

BY MR. HALLECK:

Q —would that have any significance to you?

* * * *

THE WITNESS: It would mean to me that the—that
whatever stimulated the increase in progression was a
slow process. It did not stimulate any sudden increase.

BY MR. HALLECK:

[45] Q Doctor, do you know of any prior medical his-
tory or treatment of difficulty with her knee that Mrs.
Curry had before she came to you?

A No, I don't.

* * * *

THE DEPUTY COMMISSIONER: * * *

Dr. Sugar, do you feel you are in a position to make
a reasonable estimate, although you may not have a note
on it?

THE WITNESS: Yes, sir.

* * * *

[46] THE WITNESS: That soon after the operation,
two weeks, she would have practically complete limitation
of motion.

BY MR. HALLECK:

Q Of the knee?

A Of the knee, yes, sir.

* * * *

Q And as of this moment do you have any idea what
the degree of limitation is?

* * * *

[47] THE WITNESS: Yes, after this length of time I would expect quite a bit of improvement.

BY MR. HALLECK:

Q Doctor, I believe in your direct examination you stated something to the effect that when it became apparent that this might be a compensation case then your staff gathered together some records.

When did it become apparent that this might be a compensation case?

A I don't recall the exact date.

Q Was it quite some time after the operation?

A I'd say several weeks.

Q Several weeks?

A Yes.

THE DEPUTY COMMISSIONER: Several weeks after the operation?

THE WITNESS: Yes, sir.

BY MR. HALLECK:

Q And to whom, if you know, did it become apparent that this might be a compensation case?

A I'm not sure. I think we got a request from the insurance company for a report. I'm not sure exactly, but that's when the first report was sent.

* * * *

[48] BY MR. HALLECK:

Q Doctor, here is a letter from Charles Baggett of the Liberty Mutual Insurance Company dated November 27, 1964.

Was that letter the thing that prompted the belief that [49] there might be compensation involved in this case?

A I do not recall it.

Q Do you know if that letter was received? Do your records show whether that letter was received?

A Not by me.

Q It would have been received by somebody at Providence Hospital?

A Yes, the record librarian there.

Q And that would have been the point at which they put together the records.

Is that correct?

A Well, it may have been some time after that that someone there informed my office.

Q And this was the letter, dated November 27th, 1964, to the medical records department at Providence Hospital?

A (No response.)

MR. HALLECK: Well, I'll just offer this letter in evidence.

THE DEPUTY COMMISSIONER: The Doctor said several weeks after surgery he learned about it.

He doesn't recall having received that letter, so apparently it was belatedly brought to his attention that this could be a workmen's compensation case.

Is that correct?

[50] THE WITNESS: That's correct.

THE DEPUTY COMMISSIONER: He has testified several weeks, it could have been a month after the discharge from the hospital or more.

BY MR. HALLECK:

Q Doctor, Providence Hospital and you particularly, you are acquainted with workmen's compensation law and the provisions of the law paying the hospital bills of patients who are injured on the job, are you not?

A Yes, sir.

Q And when you take a history from a patient, if it's apparent from that history that they were injured on the job, you immediately maintain records and assume it's a compensation case, do you not? As the usual course?

A Yes, sir.

* * * *

[51] Q You don't operate on a patient that is involved in a compensation claim without first getting the authority of the insurance carrier to perform the operation.

Is that correct?

A Not usually, unless it's an emergency.

Q Was Mrs. Curry's case an emergency?

A No, sir.

* * * *

[52] Isn't it customary to take a history?

THE WITNESS: Yes, it is.

Usually before the patient is admitted, if he's a clinic [53] patient, the social service somewhere makes an investigation to see if they are eligible. If they can find out that they think it is a compensation case then they usually indicate it somewhere.

However, if they get an inexperienced social worker there they may not realize that.

So there are a lot of factors involved in making us aware that it could be a Workmen's Compensation case.

BY MR. HALLECK:

Q Now, to the best of your knowledge, up until the point where there was some inquiry made by Liberty Mutual asking for photostats of medical records from the medical records department, nobody at the hospital, to your knowledge, in any of the hospital records made any indication or notation that this might be a compensation case?

Is that correct?

A That's correct.

* * * *

[54] THE DEPUTY COMMISSIONER: * * *

* * * *

I think my question was this, Dr. Sugar. You said there was a causal relationship apparently on the basis of an aggravation of this pre-existing condition and I

think Mr. Cohen asked you the question and he seemed to suggest a link between these two as being the triggering of a pre-existing condition into disability by the injury.

* * * *

To really place a pre-existing condition like this on sort of an aggravated state, what type of an injury would you need?

THE WITNESS: A direct blow could start it or a twist.

THE DEPUTY COMMISSIONER: A twisting or an [55] impact type of—

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: —trauma?

Now, on the impact, how severe do you think that would have to be?

THE WITNESS: It doesn't have to be very severe if it has struck the right portion where there was already some trouble.

* * * *

[56] THE DEPUTY COMMISSIONER: It was the mechanics of the injury that I was really interested in, whether it would have to be some object which hits the knee with terrific force, slight force, or moderate force.

THE WITNESS: Hitting the two damaged portions together we'll say, could be a slight force.

THE DEPUTY COMMISSIONER: Could be a slight force.

Would you say then that when that does happen and if it triggers a pre-existing disease condition so that it becomes aggravated, do you feel that the patient would nevertheless be able to continue working for at least a period of a week or maybe work continuously for more than a week?

* * * *

THE WITNESS: It depends on the makeup of the person. If they're a stoic and can work with pain, they can keep working to some extent.

THE DEPUTY COMMISSIONER: How about medical attention?

THE WITNESS: There again they could put up with it for a while before seeking medical attention.

* * *

[58] THE DEPUTY COMMISSIONER: * * *

I think, Dr. Sugar, you have testified that it is a disease which may be constitutional which a person develops by himself, it's a progressive disease and from what you have testified we also learned that it could be aggravated if there was an injury which the claimant sustained to her right knee with sufficient force to sort of jam parts of that soft tissue or cartilage against each other or against some other bone or something, that there could be a triggering of the disease process.

Am I right in saying that?

THE WITNESS: That's right.

* * *

[60] BY MR. COHEN:

Q We were discussing, Dr. Sugar, the extent of the impact required for the conditions concerning which you have testified in this type of case.

Would the impact caused by the falling of a large pot on the knee and the patient thereafter as a result of the impact, falling to the floor and striking the knee on the floor be a sufficient impact?

A Yes, sir.

* * *

[61] BY MR. HALLECK:

Q Doctor, if she had given you a history of an occupational injury causing the accident, your usual practice

would have been to make a note of it, assuming it was a compensation case, wouldn't it?

A Yes, sir.

Q And you don't have any such note and you didn't indicate—make any such assumption, did you?

[62] A No, sir.

* * * *

Q Doctor, did you see the x-rays that were taken by somebody else earlier of Mrs. Curry's knee before you operated?

A Yes, the ones taken at Providence Hospital.

Q There were x-rays taken at Providence?

A Yes, sir.

Q That was sometime before the—

A Prior, sometime prior to surgery.

Q Yes.

And you reviewed those, did you not?

* * * *

[64] THE WITNESS: You mean on x-ray?

THE DEPUTY COMMISSIONER: Yes.

That would be about the only way you could tell, isn't that so?

THE WITNESS: No. You would know by symptoms.

THE DEPUTY COMMISSIONER: I see.

THE WITNESS: Your clinical findings, you could tell more by that actually, in this type of condition than we can by x-ray.

THE DEPUTY COMMISSIONER: In other words, if a person sustained an injury and x-rays were taken right that same day or, let's say, the next day and let's say that the type of injury was sufficient to cause an aggravation, the aggravation couldn't take place within that day or two?

THE WITNESS: The aggravation could take place but it would not necessarily show up on x-rays.

THE DEPUTY COMMISSIONER: I see.

* * * *

[65] BY MR. HALLECK:

* * * *

Q That an alleged injury occurs and this may then go along for a few days or a week or so and then symptoms begin to dramatically increase?

A Yes, she may have had symptoms before but I assumed that the injury aggravated her condition so that the symptoms increased to the point where it disabled her.

Q Now, if she had symptoms that were disabling her for—causing her a good deal of pain and discomfort for a month or two prior to the alleged incident and they just kept getting worse right through this alleged incident of the pot, would it be natural to assume that there may have been some other twisting or bumping that occurred several months before that began the progression [66] of symptoms which normally disabled her on or about September 8th?

A I'd say I would certainly have to take it into consideration that such a thing could happen.

* * * *

THE DEPUTY COMMISSIONER: * * *

If there is an aggravation, would it seem logical from the medical standpoint that there would also be an exacerbation of the symptoms that would take place immediately if the injury is of such sufficient—is of sufficient force as to aggravate the disease condition? Wouldn't it also at the same time exacerbate the usual symptoms that the claimant had been having prior thereto?

THE WITNESS: Not necessarily. No, sir.

THE DEPUTY COMMISSIONER: It wouldn't?

THE WITNESS: No, sir. We see that often.

* * * *

[67] CHARLES HARRY EPPS, JR.

was called as a witness by and on behalf of the Respondents, and having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

* * * *

[68] BY MR. HALLECK:

Q Doctor, do you have a specialty?

A Yes.

Q What is it?

A Orthopaedic surgery.

Q How long have you been so engaged in the practice of orthopaedic surgery?

[69] A Since January of 1961.

Q Have you taken any of the usual examinations?

A Yes, I'm certified by the American Board of Orthopaedic Surgery.

THE DEPUTY COMMISSIONER: You're a diplomate of the Board?

THE WITNESS: Yes, I am, a diplomate of the Board.

* * * *

BY MR. HALLECK:

Q Doctor, you did examine the patient, Susie Curry, who sits to your immediate right in the white sweater, did you not?

A Yes.

Q Was she referred to you by some other doctor?

A Yes, she was.

[70] Q By whom was that?

A Dr. Francis Blackwell.

* * * *

Q Now, she came to see you, I take it, October 19th, 1964?

A That's correct.

Q Now at that time did you obtain a history from this lady, doctor?

A Yes.

Q What history did you get?

A She told me that she had had some swelling of her knee for about a month and that the knee had—recently the swelling had subsided.

I asked her about locking and clicking and that sort of thing but this was questionable as to whether she had actual locking.

She felt that the knee had, on occasion, given way but [71] there was no definite history of locking.

I did not get a history of trauma from her at that time.

* * * *

[72] Q Now, do I understand, Doctor, it was your impression that—or your diagnosis that she was suffering from chronic hypertrophic degenerative arthritis and synovitis in her right knee?

A Yes.

Q Would you describe for us in layman's language, if you will—I realize this is a hard thing to ask a doctor [73] to do and perhaps unfair—But if you could explain to us in layman's language just what that is and how long it takes to arrive at the condition that you observed.

A Well, the patient was 54. The x-rays, I felt, were consistent with her age.

At the margins there were small spur formations which I felt represented degenerative arthritic changes.

Usually in a situation like there is some thickening of the synovium, which is the lining of the knee joint which elaborates fluid. Sometimes this lining becomes thickened and, of course it may elaborate fluid and produce a fluid which we find free in the joint.

I felt that her symptoms were due to these changes and for this reason I prescribed the butazolidin.

I could not demonstrate by manipulation of the knee that the body I saw on x-ray was free in the joint. So

that I felt her symptoms were attributed to the condition of the joint itself and the synovium.

* * * *

Q Doctor, I show you now a copy of an operative report by Dr. Sugar (handing document to the witness) [74] and I would ask you to take a look at that and after you have had a chance to read it, the question which I will ask you is this:

Is that operative report and what Dr. Sugar found upon operation consistent with your diagnosis?

A (Reading report) I'd say it's consistent.

His postoperative diagnosis was severe chronic synovitis with several loose bodies in the right knee joint which, according to his report, came from the cartilage of the patella and the femoral condyle.

Q And is that, Doctor, consistent with a chronic and degenerative type disease process related to arthritis of the knee?

A Quite frequently, yes.

Q You say you obtained no history at all of any trauma from this lady?

A No, I did not.

As I reviewed my notes I have no—I was not aware of any trauma involved in the patient's history.

The major complaint was swelling of the knee, persistent swelling of the knee.

Q Now, Doctor, had she said anything to you about any traumatic injury, is it your normal practice to make such a note in your records?

A Yes. Yes.

[75] Q And you have no such note?

A I have no such note.

Dr. Blackwell did not refer to trauma in his referring note.

* * * *

Q And what was the date of this examination, Doctor?

A My examination?

Q Yes.

A October 19th, 1964.

* * * *

BY MR. COHEN:

* * * *

[76] Q And you have clinical data. And you give her occupation as Florida Products Company.

* * * *

Q And the occupation is down here as Florida Products Company.

* * * *

A She works for them. That's her employer, yes.

Q And you have here swelling of the right knee about a month ago.

* * * *

A Swelling of the right knee approximately—This is an abbreviation—for approximately one month. Has subsided. Questionable locking. Has had swelling, giving way.

* * * *

[77] Q And what's down at the very bottom there? Would you read that, please?

A It says paid 5/5/65, Florida Products Company.

* * * *

Q And, as you have said, your examination was October 19th, and you said: Patient indicates swelling of the knee approximately one month prior to the examination.

A That's right.

* * * *

[79] AMELIA BRICE

was called as a witness by and on behalf of the Claimant and, having first been duly sworn by The Deputy Commissioner, was examined and testified as follows:

* * * *

BY MR. COHEN:

* * * *

Q Where do you work, Mrs. Brice?

A Florida Products Company, 57 N Street, Northwest.

* * * *

[80] Q Well, you got a summons to come here, didn't you, Mrs. Brice?

A Yes, sir.

* * * *

THE DEPUTY COMMISSIONER: You mean a subpoena?

MR. COHEN: A subpoena to come here.

THE WITNESS: Yes.

BY MR. COHEN:

Q Do you know the claimant here, Mrs. Curry, Susie Curry?

A Yes, I do.

[81] Q How long—Did she work at Florida Products Company?

A Yes, she did.

Q And how long did she work there?

A Oh, probably about 19 years or 20; about 20 years. She been there about the same time I were.

* * * *

Q * * *

* * * *

In the early part of September 1964 did Mrs. Curry have an accident at Florida Products Company?

A Yes, she did.

Q Tell us what you know about it, Mrs. Brice, would you, please?

A Yes, sir. I was doing some washing at the sink and she was taking the beater, the pot, over to where we hangs it up to clean it up. And she takes it over there and so I still stayed at the sink, I was washing, and I

heard the pot fall, and I turned around and I looked and she was there.

Q Down on the floor?

A Yes, she was.

[82] Q Did somebody help her up from the floor?

A Yes. It was the boy that work in the—

Q Joseph Williams?

A Yes.

Q Is he still working there?

A Yes, he's still working there.

Q But he's not here today, is he?

A No, he's not.

* * * *

[84] THE DEPUTY COMMISSIONER: Go ahead.

Do you know why Williams isn't here today? Do you have any idea?

THE WITNESS: He said he was afraid he would lose his job.

THE DEPUTY COMMISSIONER: He told you that?

THE WITNESS: Yes, sir.

* * * *

MR. COHEN: NO. It was served by mail. But he acknowledge receipt of it. He admitted that he received it and said that he wouldn't be here because of fear of losing his job.

* * * *

Q Now, who helped Susie up when she fell?

A Joseph Williams.

[85] Q Did Susie say anything?

A She said that she had hurt her knee.

Q Who are the owners of Florida Products Company?

A Mr. William F. Lane is the owner of it.

Q And does he have a brother who is in the business?

A Mr. Pete Lane.

Q And were they there?

A Yes, they was there.

Q And did they say anything at that time?

A Mr. Lane told them he wanted them to keep that floor clean so nobody would be falling.

Q Who said—Which Mr. Lane said that?

A Mr. William F. Lane.

Q And who did he say that to?

A To his brother.

Q What was the condition of the floor, Mrs. Brice?

A It's a cement floor.

Q Well, was it slippery or anything of that nature?

MR. HALLECK: * * *

You don't have to prove negligence. The mere fact—If an accident occurred, the mere fact that it occurred is—How it occurred is immaterial.

MR. COHEN: I grant you that. You are absolutely right. But since there has been overwhelming, vicious, [86] violent controversy over the happening of this accident, I want to show beyond question—

* * * *

[87] BY MR. COHEN:

Q Mrs. Brice, you said it was a cement floor.

What was the condition of the floor?

A The floor, it was all right. But where they beat [88] that stuff to make different things with, some of it—you know—like if you run a beater, it'll splash it on the floor.

Q Was it slippery?

A (Nodding head.) That's right.

* * * *

Q Now, about what time of day did this happen?

A This happened, it was after lunch.

Q And did Susie work the rest of that day?

A Yes, she did.

Q And do you remember, Mrs. Brice, if she worked the rest of that week?

A To my knowing, yes, she did, work the rest of that week.

Q The rest of the week?

A I think she worked the next week too.

Q Did she say anything about her leg?

THE DEPUTY COMMISSIONER: Mr. Cohen, I would suggest you advise your client not to make any gestures, to shake her head in either direction.

We want this witness's testimony. We don't want it to be supervised by the claimant.

BY MR. COHEN:

Q While she was working did she say anything about [89] her leg?

A Yes. She said her leg was worrying her.

Q How did she travel back and forth to work?

A Well, I was at work when she came, but in the afternoons sometimes I would catch a cab for her to go back home.

Q After she hurt herself?

A Yes.

* * * *

You didn't work on Labor Day, Monday, September 7th, did you?

A No, we didn't.

* * * *

A No, she didn't come back after Labor Day.

Q Now, were you questioned by a man from the insurance company?

A Yes, I were.

[90] Q And did you tell him everything just the way you are telling it today?

A No. Because he just asked me my name, and I told him. He asked me did she fall and I told him yes, she did, and he asked me where did she fall, and I—

* * * *

THE WITNESS: —showed him the pot which she was carrying across there when she fell.

* * * *

BY MR. COHEN:

Q Was this questioning at the company, at the place where you worked?

A Yes, sir.

Q And was the pot there?

A Yes, sir, the pot was in there. But he didn't go all the way back there. He just looked at the machines that was running.

Q Did you tell him where the pot was?

A Yes, sir.

* * * *

[91] Q * * * will you describe to the judge the pot?

We want to know what kind of pot it was and how big it was and how much it weighed. Tell us as much as you can about it, Mrs. Brice.

Q It's about that big around (indicating). How much it weigh, I couldn't tell you.

THE DEPUTY COMMISSIONER: Let's see now, according to the way you are holding your arms, that would be a pot with a diameter of about 30 inches?

* * * *

[93] BY MR. COHEN:

Q What is it made of, Mrs. Brice?

A I would call it enamel, that's what I'd call it. It's not aluminum. It's heavy enamel.

* * * *

[94] BY MR. HALLECK:

* * * *

[95] Q Now, you didn't actually see Susie fall, did you?

A I told you, when I was at the sink—She was carrying the pot. I heard the pot when it hit the floor and I looked, and there was her and the pot both down there.

Q You heard the pot hit the floor?

A Yes, I did.

Q And when you looked around where was she? Sitting down on the floor?

A No. She was on her side kind of.

Q Kind of on her side?

* * * *

Q Where was the pot at that time?

A It looked to me like the pot was right there by her.

Q Four-five feet away?

A No, indeed, hunh-unh. Because Joseph was there [96] when I seed her.

* * * *

A Because Joseph was right at the machine which we run when she fell.

Q Who was?

A Joseph Williams.

* * * *

THE WITNESS: I do not know, because when I seed her, I knows she was down.

* * * *

[97] THE WITNESS: She was getting up when I seed her. Joseph was right there with her, had her by the arms.

* * * *

BY MR. HALLECK:

* * * *

A No, she wasn't getting up when I seed her. She was just like that (demonstrating) on the floor.

Q And Joseph turned around and picked her up by the arms, caught her arms and helped her to her feet.

Is that right?

A That's what he did.

* * * *

[98] Q She finished out the day?

A Yes, she did.

Q And she went home with you then that evening, did she?

A I went with her until I caught a cab.

* * * *

[103] THE WITNESS: She worked, I think around two weeks.

THE DEPUTY COMMISSIONER: She worked about two more weeks.

* * * *

THE DEPUTY COMMISSIONER: And then about right after Labor Day she didn't come back to work any more?

THE WITNESS: No, sir. She couldn't work.

THE DEPUTY COMMISSIONER: Now, I want to go back again. You said you heard a noise.

THE WITNESS: (Nodding head.)

THE DEPUTY COMMISSIONER: You heard a noise?

THE WITNESS: Yes, sir, from the pot or something. As big as that is, that thing hit the floor, anybody would look. That pot—

THE DEPUTY COMMISSIONER: What hit the floor?

THE WITNESS: The pot.

THE DEPUTY COMMISSIONER: The noise of the pot attracted your attention?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: And when you turned, you saw her on the floor.

[104] THE WITNESS: Yes, sir.

* * * *

[105] SUSIE CURRY

the Claimant, was called as a witness in her own behalf and, having first been duly sworn by The Deputy Commissioner, was examined and testified as follows:

* * * *

[107] BY MR. COHEN:

Q And your age, please?

A 55.

Q You were employed by Florida Products Company?

A Yes, sir.

Q When did you start to work for them?

[108] A I was there going on 19 or 20 years, but I don't know the regular date.

Q And did you work regularly?

A Yes, sir, every day.

Q And before the accident of September 1964, a year ago, did you lose much time from your job?

A No, sir, not too much time.

* * * *

Q But as a result of that were you losing time from work, or were you going to work?

A I was going to work.

Q You were working every day?

A Every day. Every day.

* * * *

Q Now, did there come a time in September of 1964 when you had an accident on the job?

A Yes, sir.

[109] Q Tell us all about it, Mrs. Curry.

A Well, I was at the sink washing a pot and I was carrying it back over to the beater.

* * * *

Q You were here when Mrs. Brice was describing the pot. Is that the pot?

A Yes, sir.

Q Is it made of enamel?

A No, sir. It's something like stainless steel, I think [110] they call it. It's more like an iron. Like it's heavy. I think they call it stainless steel.

* * * *

Q Do you know how heavy it was?

A No, sir, but it was real heavy. But I don't know exactly how many pounds it weighed.

* * * *

A Well, I was washing the pot at the sink and I was carrying it over to the beater and I fell and I was still holding to the pot when Joseph Williams picked me up, and Mr. Lane and Mr. Pete was standing on the side.

And Mr. Lane tell Mr. Pete to wash up that syrup down there and keep this place clean.

Q Wash up the what?

A Syrup. You see—

Q Is that s-y-r-u-p,—

A Yes, sir.

Q —syrup.

A Yes, sir.

And keep the floor clean.

So Joseph picked the pot off me and helped me up.

[111] Q Picked the pot up off you?

A Off of me, yes, sir. I was kind of like that (demonstrating), just like that. But I still was holding to the pot on the side.

Q Did the pot hit any part of your body?

A Yes, sir. It hit my right knee.

Q And when you got up did you have any trouble?

A I had trouble when I got up, because Joseph helped me up and I walked over to the sink hopping.

Q Why were you hopping?

A Because my leg was hurting me.

Q The right leg?

A Yes, the right leg was still hurting me.

Q Did you—Was this after lunch?

A Yes, sir, after lunch.

Q Did you have any breaks from lunchtime until the end of the day? Did you have any breaks?

A We have from three—we have ten minutes.

Q Did you have your break that day?

A Yes, sir.

Q Aside from the break did you continue to work that day?

A Yes, sir.

Q Did you have any pains or trouble while you were working?

[112] A Yes, sir. It hurt me up in my hip, right hip.

Q How did you get home that night?

A I got a taxi.

* * * *

Q Did you have trouble during that week?

A Yes, sir.

My leg was still hurting me, and I would rub it at night.

Q How did you get back and forth from home to work?

A Well, I got a ride that Friday to the job. And that Tuesday I got the bus. And going back home that Tuesday evening I couldn't move my leg it was hurting me so bad, so one of the boys on the job took me home.

* * * *

Did you work after Labor Day?

A No, sir. I haven't worked since.

Q Do you remember how many days you did work?

[113] As best you remember how many days did you work after the accident?

A Well, as far as I can remember, after the accident it was about three days, as far as I can remember.

Q Who are the owners, who are the bosses there at Florida Products Company?

A Mr. Pete Lane was our boss.

Q Did he know that you were hurt?

A Yes, sir.

Q How did he know that you were hurt?

A Him and his brother, Mr. William, was standing right side by side when I fell.

Q Was anything said about your getting medical attention?

A No, sir.

Q Now, you said you were then seeing Dr. Montgomery for your diabetes.

A Yes, sir.

Q Did you go to see Dr. Montgomery?

A Yes, sir.

Q And did you tell him about your leg, your knee?

A I didn't say nothing about it the first time. But the second time I went there I was hurting so bad—He was giving me a needle, you know, for my diabetes—and I told him then about my knee.

[114] Q Did he give you anything to help your leg, or your knee?

A Well, he give me some pills, that's all.

Q Did he do anything besides that?

A No, sir.

Q And then did you go to another doctor?

A Yes, sir.

I was recommended to Dr. Blackwell.

* * * *

Q And what did he do?

A Well, he come and look at it and feel it and he said, Oh, your leg's in bad shape. He said you need to have an x-ray right away.

So he sent me to 915 Rhode Island Avenue to have a x-ray.

And then he got the x-ray and he called me and told me to come to the office. So I went to the office and he showed me—He said you have a chipped bone right here. He said you have to go to have it operated on, go to the hospital.

So he had another x-ray made to be sure. So he showed me the same thing on that one.

[115] Q Where did he have the other x-ray made?

A Same place. Same place.

And then he sent me to Freedmen's Hospital to see Dr. Epps, and to take the x-ray and the letter. He sent

me with a letter. It was sealed up. I don't know what was in it. Sealed up.

Q Yes?

A And when I got there, I waited a good while on Dr. Epps, and so finally he come in and he told me to get up on the bed.

So I took the stool beside the bed and hopped up on the bed. There wasn't no nurse.

He was in another room. And I got up on the bed and he come in. So he feel my leg like that (demonstrating) and tell me there wasn't nothing wrong with the leg.

He said go home and take an old pocketbook and put it on your leg. That's what he told me.

Q Were you working then or not?

A No, sir, I wasn't working. I wasn't working.

* * * *

[117] Q Did there come a time after the accident, Susie, when you called me and I told you to go to the Compensation Bureau, that you didn't need a lawyer for that and you could go to the Bureau yourself?

A Yes, sir.

* * * *

MR. COHEN: * * *

It's merely that she filed a claim herself without me, that in connection with the time lapse she—it wasn't until I advised her that she didn't need a lawyer and [118] that she could go to the Bureau herself. That's my only point.

* * * *

[119] * * * And if I may respectfully say so, that letter is garbled. It gives the date of November 6th and says something about an injury to your right hand.

Well, she had no injury to her right hand.

* * * *

[127] MR. COHEN: * * *

There is a difference between the way she stated she fell and the statement in Dr. Gordon's report that she fell on her buttocks, because she never said she fell on her buttocks.

I want to develop—

THE DEPUTY COMMISSIONER: Well, if you think it's important, go ahead.

* * * *

BY MR. COHEN:

Q Tell the Commissioner, tell the Judge what you said to Dr. Gordon when he asked you how you fell.

[128] A When Dr. Gordon asked me how I fell, I was showing him and telling him how I fell, he said No, you didn't, you fell like this, you fell on your buttocks.

And I said no, sir, I fell just like this, Dr. Gordon.
* * *

* * * *

THE DEPUTY COMMISSIONER: Well, let me ask you. You know when you fall on your buttocks that that's the seat. You understand that?

THE WITNESS: Sir?

THE DEPUTY COMMISSIONER: The buttocks, you understand that to be the seat of your body? When you sit down, you sit on your buttocks. Right?

THE WITNESS: Yes, sir, * * *

* * * *

THE DEPUTY COMMISSIONER: Weren't your buttocks on the floor?

THE WITNESS: I was sitting like this (demonstrat-
[129] ing) on the floor, on one side.

THE DEPUTY COMMISSIONER: You mean one side was on the floor?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Which side?

THE WITNESS: The right side.

THE DEPUTY COMMISSIONER: Your right side?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: In other words, the right buttock was on the floor?

* * * *

THE WITNESS: Yes. This (indicating area of right buttock) what-you-call it, I was sitting like that.

THE DEPUTY COMMISSIONER: You landed in a side position?

THE WITNESS: Yes, sir.

* * * *

[131] Q Talking about your right knee, forgetting about the buttock and talking about the right knee—

A Yes.

Q Did that hit anything?

A My right knee?

Q Yes.

A The pot hit that.

Q The pot hit the right knee?

* * * *

Q After you were operated on at Providence Hospital when you—what was the condition of your knee when you came out of Providence Hospital, your right knee?

A It still was paining me and it was still stiff.

It's stiff now. I can't bend it back like I can this one (indicating left knee).

* * * *

[137] BY MR. COHEN:

Q What do you have on the knee now, Mrs. Curry?

A I have a knee brace on my knee.

Q Who gave you that?

A Well, the doctor at George Washington University last Friday tell me to wear a knee brace. And I tell her

that is too tight, but she say you have to wear that, either [138] that or an Ace bandage, and she say that would give some. So I was wearing the one that I had.

So when I go back over there today, they supposed to give me something for my knee today.

* * * *

(Witness exhibiting right knee to the Deputy Commissioner.)

THE WITNESS: I had 15 stitches at least.

* * * *

THE WITNESS: You want to see the surgery, the stitches?

THE DEPUTY COMMISSIONER: No, I don't have to see the stitches.

* * * *

[146] THE DEPUTY COMMISSIONER: You say you called the insurance company?

THE WITNESS: I guess it was the insurance company. * * *

* * * *

[147] Q How did you know it was Liberty Mutual?

A Because I got a letter from them.

Q When?

A The time that I got this finger hurt.

Q You got the finger hurt?

A Yes, sir. That was a long time.

Q A long time ago?

A About four or five years ago.

Q Where did you get that hurt? On the job?

A That's right.

Q And you notified your employer that you were hurt on the job?

A Oh, yeah. I went to the hospital for this.

Q And as a result Liberty Mutual contacted you?

A Yes, sir.

Q And they supplied you with benefits, I presume.

* * * And if I may respectfully say so, that letter is garbled. It gives the date of November 6th and says

MR. COHEN: Aren't we going far afield, Mr. Commissioner?

MR. HALLECK: I'm showing that this lady knows exactly what to do, having had past experience with it, if she has a compensable injury on the job.

THE WITNESS: What?

BY MR. HALLECK:

Q Did you receive benefits for your finger?

[148] THE WITNESS: Yes, sir.

* * * *

[150] THE DEPUTY COMMISSIONER: You were working there for about what, 20 years?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: You did have injuries on the job while you were working during those 20 years?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: Did you have more than one injury?

THE WITNESS: That's all. That's all but this [151] knee.

* * * *

[152] THE DEPUTY COMMISSIONER: But that's the reason why you called Liberty Mutual again, because you figured that that was the company that was insuring your employer?

THE WITNESS: Well, I thought so. After I got hurt before, I said, Well, it must be the same, so I called to see.

* * * *

[153] BY MR. HALLECK:

Q In 1957 you were working for the Florida Products Company, weren't you?

A '57?

Q Yes.

A Yeah, I been there 20 years, almost 20 years.

Q That's right.

And your name was Susie Rose then, wasn't it?

A Yes, sir.

Q And you lived at 736 Howard (sic) Street, Northwest?

A That's right.

Q And in May of 1957 you were standing on some cans, you slipped and fell and struck your right knee, didn't you?

A No, sir. No, sir. There was nothing wrong with my knee.

Q There was nothing wrong with your knee?

A No, sir.

Q You didn't go to the Union Market Clinic for it and get diathermy and an Ace bandage, hot compresses?

A No, sir.

Q And medication?

[154] A No, sir.

Q You did not?

A Not for my knee. I went there once for my ankle, but not for my knee.

Q For your what?

A Ankle, not my knee. No, sir.

That was the first time my knee ever bothered me.

* * * *

THE WITNESS: No, sir, my right knee never did worry me until this time.

Before it was my ankle and my finger right here.

BY MR. HALLECK:

Q I show you now a Workmen's Compensation—Union Market Clinic Workmen's Compensation Attending Physician's Report signed by Edward Caftiz dated May 13, 1957.

I will ask you to look here and read what they've got written down as what was wrong with you, and ask you if that refreshes your recollection.

(Mr. Halleck exhibiting document to the Witness.)

* * * *

[155] Q Down below that. Right about where you've got your thumb, where it's typed in there.

A Yeah. Yes, sir.

Q What does that tell about?

[156] A It says standing on cans, standing on cans and—striking—

Q Slipped and fell?

A Uh-huh.

Q Striking the right knee?

A Yeah, but that's not so.

Q You didn't tell them that at the Clinic?

A That I fell on cans, slipped on the cans?

Q You didn't—

A No, sir.

Q You didn't tell the doctor at the—

A No, sir.

Q —clinic what happened to you?

A No, sir. I didn't tell him I slipped on no cans, because I wasn't standing on no cans.

THE DEPUTY COMMISSIONER: At this point there is no use in questioning the claimant.

There is a record here in the office of an injury in 1957.

MR. HALLECK: Well, I'll submit this 1957 form, I'll offer it as an exhibit

THE DEPUTY COMMISSIONER: Let's see what we have.

(Mr. Halleck handing document to the Deputy Commissioner.)

The administrative file on that case is here. Look at [157] it, Mr. Cohen, and we'll put it in.

MR. COHEN: I won't raise any question about it.

Anything that happened in '57, to me has no connection with this case.

* * * *

THE DEPUTY COMMISSIONER: Just so that we don't take other files and have them collected in for that, we can say that this office has an injury file, that the claimant here, since she has admitted her name was Susie Rose and she lived at 736—Is that Harvard Street, Northwest, Washington, D. C.?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: It shows that on May 3rd, 1957, she slipped and fell striking her right knee while she was on duty cleaning up the place.

A medical report has the additional item that she was standing on some cans.

Anyway, the doctor's report which came from the Union Market Clinic shows a diagnosis of a contusion of the interior-anterior aspect of the right knee with marked pain.

The x-ray was negative for fracture, and the comment is there is some old arthritic lipping of the articular surfaces.

She was paid compensation for one and four (sic) [158] weeks after they deducted the three-day waiting period, which would show a disability period of actually two weeks.

* * * *

[160] THE DEPUTY COMMISSIONER: You say you hurt yourself, you fell and hurt yourself. Now, how long did you keep working after that?

[161] Did you work for one day and then stop?

THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: Did you work for a week, two weeks, three weeks—

THE WITNESS: No, sir.

THE DEPUTY COMMISSIONER: —four weeks?

THE WITNESS: No, sir.

I worked—When I had that fall, as close as I can get to it, it was two or three days—because it was the weekend and the holidays was coming in between. Then I

went back to work that Tuesday, and I haven't been back since.

* * * *

[163] THE DEPUTY COMMISSIONER: According to your testimony you were injured on a Tuesday, you don't know the exact date, but you worked for three days after that.

You worked that afternoon.

THE WITNESS: Yes, I did.

* * * *

[164] THE DEPUTY COMMISSIONER: All right.

THE WITNESS: And I showed it to Mr. Lane and I said, Mr. Lane, see my leg, it hurt me so bad—

* * * *

[165] BY MR. HALLECK:

Q Now, when you say you fell with this pot, was the pot empty or full?

A It was empty.

Q Nothing in it?

A No, nothing in it.

Q You slipped?

A That's right.

Q And you held onto the pot all the way down, fell down still holding the pot?

Is that what you're telling us?

A Yes, I did.

Q You never let go of it?

A No. I held it—It happened so quick. You could [166] be walking out there right now and fall down and what you got in your hand, you'd still hold onto it.

Q So it never hit the floor, in other words?

A I don't know about that.

Q Your feet slipped out from under you?

A I went down—I told you, I fell down and when I find myself, I was down like that (demonstrating) and the boy, Joseph, Young Williams, took the pot out my hands and then helped me up.

THE DEPUTY COMMISSIONER: When the witness said she fell down "like that" it's the same way as she described previously.

MR. HALLECK: A sitting position.

THE DEPUTY COMMISSIONER: A sitting position, somewhat towards the side.

* * * *

[167] Q Now, how long had you been going to Dr. Montgomery before you switched over to Dr. Blackwell?

A Oh, I don't know exactly how many years, but a long time.

Q He's been your family doctor for years, hasn't he?

A Yes, sir.

Q And he's been treating you for your knee bothering you for some time, hasn't he?

A No, he never has treated me for my knee.

Q He never did treat you for your knee?

A Not for my knee.

Q He never did treat you for arthritis in your knee?

A No, sir.

My hip was worrying me with arthritis some time.

[168] Q Didn't you tell the gentleman from the insurance company who interviewed you that you had been going to Dr. Montgomery, had seven or eight visits, and he was giving you needles for your right knee?

A No, sir, not for my right knee.

He was giving me needles in my shoulder, giving me needles in my shoulder. * * *

* * * *

[169] Q How long have you been married to your present husband?

A I got married the 22nd of September, going on a year ago.

* * * *

[171] BY MR. HALLECK:

Q Now, when you showed—On September the 8th you

showed your swollen knee to Mr. Lane at that time, didn't you? The last day you worked you showed Mr. Lane the knee, that your knee was swollen, didn't you?

A Yes, I showed it to him.

* * * *

[172] Q What caused you to go and show him your swollen knee?

A Because I was hurting so bad, and I went over there to tell him—I said, Mr. Lane, you see my leg? I said I can't hardly walk. It hurt me all up in my hip. See? And I showed it to him.

And he said Susie, go home and stay until you get better and then you come back. That's the words he give to me.

* * * *

[176] BY MR. HALLECK:

Q On the day you fell you didn't go to the clinic, did you?

A He didn't send me. No, sir, I couldn't go.

How could I go? They always write you a slip and give you that slip, and then some of the boys take you over to the clinic.

Q Did you go and ask if you could go to the clinic?

A No, sir; I didn't have to ask before.

When you get hurt 'round on the job, you don't have to go and ask, they're supposed to send you to the clinic. That's the way Mr. Whitman did when I cut my finger and hurt it.

* * * *

[186] JOE MACK WILLIAMS

was called as a witness by and on behalf of the Claimant
* * *

* * * *

[187] BY MR. COHEN:

Q You work for Florida Products Company, Mr. Williams?

A I do.

* * * *

Q Do you know Mrs. Curry?

A Yeah, I know her.

* * * *

Q Did you see her fall down at Florida Products Company about a year ago, in September 1964?

A I don't know the date, but the day she fell down I picked her up.

* * * *

[190] BY MR. HALLECK:

* * * *

Q * * * When you first saw her was she sort of sitting down on the floor or was she lying down or how was she?

A No, when I saw her she was down on her knees.

[191] Q On her knee?

A Yeah, She fell on her knees.

Q Which knee?

A On both her knees. She fell on her knees, and I pick her up. And I took—

* * * *

Q Did you—You say when you picked her up you asked her if she was all right?

A Yeah, I asked here if she was all right. And—

Q What did she say?

A She said her legs were hurting her a little bit. But then she walk away, and I walk away and went on back to my work.

* * * *

[193] CHARLES R. LANE

was called as a witness by and on behalf of the Respondents * * *

* * * *

Q Are you also known as Pete Lane?

A Yes, sir.

Q And what is your position or status of ownership or whatever it is with the Florida Products Company?

A I'm in charge of the syrup room.

Q Is Susie Curry an employee over whom you have supervisory control?

A She was, yes.

* * * *

[194] Q Now, Mr. Lane, do you recall any time in the past year or two years that Susie Curry fell down in your presence?

A Yes, I recall when she fell down, late one afternoon when we were cleaning up there. I was in the room at the time.

Q Do you have any idea when that might have been?

A No. It's pretty difficult to say. It was a year or more ago, over a year ago.

Q And can you fix a day of the week? Do you have any recollection of what day of the week?

A It—I'm positive it was Friday afternoon.

Q Why are you positive of that?

A Why? Because on Friday afternoons we have cleaning down thoroughly and hosing the floors down, things of that kind.

Q Do you have any recollection of having seen her fall down?

A I didn't actually see her, no.

Q When did it first come to your attention?

A When I heard her say something or either heard the small kettle she was carrying hit the floor, I turned and saw her.

[195] Q What sort of a kettle was it that she was carrying?

A It was a small kettle that's used on a beater.

I'D say it's about (indicating with hands) 18 inches in diameter and possibly 15 or 18 inches deep, with a round bottom.

Q Stainless steel?

A No, it isn't stainless steel.

Q What's it made of?

A It's a galvanized kettle—or tin, at least, it's not galvanized.

Q Do you have any idea about what it weighs?

A I'd say between 20 and 25 pounds.

Q Now, you say she was carrying one of them?

A Yes.

Q And what is the first thing you noticed, I mean in terms of her falling down?

A She was just sitting there on the floor, and one of the boys helped her up.

Q Helped her up on her feet?

A Yes, sir.

Q Now, did you go over and speak to her?

A Yes, I did.

Q What did you say to her and what did she say to you?

[196] A I asked her if she was hurt and she said no, she wasn't.

Q What then did she do?

A She went on about her work. It was, you know, near quitting time. I should say, oh, a half an hour maybe before quitting time, about three-thirty in the afternoon. So she just finished cleaning up what she was doing and punched out and went on home.

Q Did she report to work the following Monday, as far as you know?

A Yes, she did.

Q And did she work beyond that?

A Yes.

Q Do you have any recollection about how long it was she worked after this incident?

A I know it was a good length of time, I mean several months.

* * * *

Q Did she ever come to you and tell you that she was hurt as a result of that fall?

A No, she didn't.

[197] Q Do you know if she ever made any report to anyone else there that you became aware of—

A Not to my knowledge.

Q —in the company about it?

A Not to my knowledge.

Q When was the first indication that you had that she was making any sort of a complaint about being hurt on the job?

A Well, it was after she had left, after she had quit. And I think there was something from the insurance company.

* * * *

[198] Q Did Mrs. Curry make any request of you or in your presence from the day she slipped and fell or any time thereafter to send her to the clinic or furnish her medical treatment or hospitalization?

A No, sir, she did not.

She said she was all right, said she wasn't hurt, at least, when I asked her if she was hurt, she said no.

Q Did she appear to have any difficulty when she got up off the floor?

A Not the least.

Q Now, let me ask you this.

Had she, to your knowledge had she been having any medical problems or any medical difficulty prior to that?

A Well, yes sir. Ever since I've been there she's been having to take off every so often to go to the clinic because she had high blood pressure, she had arthritis, and she also had diabetes.

Periodically she would take off and go to the clinic and there were times when she came back she showed me the new pills the doctor had given her, which were usual-

[199] ly varicolored pills. * * *

* * * *

[201] BY MR. COHEN:

Q Mr. Lane, you have been with the company eight years?

A Yes, sir, between eight and nine years.

* * *

[202] Q Do you know how long Mrs. Curry has been with the company?

A Oh, Susie was there 12 years or—* * *

Q Do you know—Amelia Brice was with the company when you came there, wasn't she?

A Yes.

Q Do you know how long she had been with the company?

A I think possibly longer.

Q A little longer than Susie?

A Yes, sir.

Q And your impression is that Mrs. Curry was with the company a total of about 12 years?

* * *

Q And that Mrs. Brice would be there about 13-14 years?

A Something like that.

Q Now, during the 12 years you became well acquainted with Mrs. Curry and Mrs. Brice, did you not?

A Yes, I did.

Q It's not a big company, is it?

[203] A No.

Q And during the two years that Joseph Williams has worked there, you became well acquainted with him, did you not?

A Yes, sir.

Q Have you any reason to believe that they are untruthful?

A No.

* * *

[206] BY MR. COHEN:

Q From September 1963 to September 9th, 1964, Mrs. Curry, the claimant here, worked very regularly, didn't she?

A Yes.

* * * *

[208] MR. COHEN: * * *

Is it conceded that her last day of work was September 8th or is it controverted?

* * * *

[209] BY MR. COHEN:

* * * *

Q * * *

Now, did she quit?

A Well, she left and didn't come back to work. So the presumption was she quit.

Q You have no knowledge of her resigning?

A No, sir.

Q Or asking to be separated?

A No, sir.

* * * *

[212] THE DEPUTY COMMISSIONER: It was your testimony that the first time you knew that she was making any kind of a claim for workmen's compensation was when the insurance company got in touch with you and asked you about—

THE WITNESS: (Nodding head.)

[213] THE DEPUTY COMMISSIONER: —this injury that she alleges she had?

THE WITNESS: Yes, sir.

THE DEPUTY COMMISSIONER: That was the first information—

THE WITNESS: It certainly was, yes, sir, the first I heard about it.

* * * *

[214] WILDER P. MONTGOMERY

was called at a witness by and on behalf of the Respondents * * *

* * * *

Q Doctor, are you a general practitioner?

A No, sir, I'm in internal medicine.

Q You are a specialist in internal medicine?

A That's correct.

Q How long have you been so practicing?

A Since 1949 in internal medicine.

[215] Q What is your educational background?

A I graduated in—How far back shall I go?

Q College and medical school.

A Dartmouth College. Medical school, Rush Medical School, University of Chicago.

Certified by the National Board of Medical Examiners, certified by the American Board of Internal Medicine.

Postgraduate study at the University of Pennsylvania in chronic pulmonary diseases.

* * * Assistant Professor of Medicine, Howard University.

* * * *

Q Doctor, have you had occasion to treat Mrs. Susie Curry who sits to your right?

A Yes, I have.

Q How long has she been a patient of yours?

[216] A Oh, I think since 1949.

Q Now, specifically with reference to three conditions, arthritis, high blood pressure and diabetes, does she have difficulty with those—

A She—

* * * *

Q Now, Doctor, specifically with regard to arthritis, in connection with arthritic difficulties in her knee, how long to your knowledge has she been having that sort of difficulty?

A Her right knee first came to my attention on April the 11th.

Q What year?

A Of 1964.

* * * *

Q Did she come to you with complaints of difficulty with her right knee?

A Right knee and right wrist.

[217] Q And what particularly in regard to the right knee, what type of complaints did she relate to you at that time?

A Painful. Pain in the right knee.

* * * *

Q Did there come a time after that when she returned to you with difficulty in the right knee?

A She returned 6/27/64.

Q What were her complaints at that time?

A Right knee was painful at that time. It was also slightly swollen.

Q You were able to notice the swelling at that time?

A At that time it was visible.

* * * *

[218] BY MR. HALLECK:

Q What did you observe on examination at that time?

A Swelling and tenderness.

* * * *

Q Did there come a time when she came to you again with difficulties regarding her right knee?

A That's right.

Q When was the next time?

A July 18th, 1964.

Q Would you give us a brief statement as to what her complaints were, what you found and what you prescribed?

A At that time the right wrist and the right knee

again. This time no swelling, and treatment was the same.

Q And the next time it occurred with the right knee, Doctor?

A The next time was September 9th, '64.

Q September 9, '64?

[219] A That's right.

Q Now, what do you have down there?

A The right knee was stiff, painful and swollen.

Q Do you have any indication of any history that you obtained from her on September 9, 1964, in regard to her right knee?

A No. I have no special history there.

* * * *

Q Was it pretty much the same as it had been?

A I would say—

Q On prior times?

A No, I would say it was worse.

Q In what respect?

A Well, swollen more and more painful. Stiffness, she was complaining also of stiffness at this time.

Q At that time do your notes reflect that she gave you any indication of having suffered any traumatic injury?

A No. At that time she gave me no history in that respect.

Q When is the next time you saw her in regard to her right knee?

A September 14th.

[220] Q And what were your findings at that time? What did you see?

A The knee was about the same. It remained about the same all through September, possibly got slightly worse.

Q At any time did she give you any history during September of 1964, any history of any traumatic injury?

A Not in September.

Q When was the first time—If—Let me ask you this. Did she at any time give you any history of any traumatic injury to her right knee?

A Yes, she did.

Q When was the first time that she came to you with some story like that?

A That was after—some time after she had discontinued treatment with me.

She came back to have a blank filled in. At that time she mentioned—I believe she said she had a bone broken.

I asked her why she hadn't mentioned an injury and she said she hadn't thought it was significant.

Q Is this, the Attending Physician's Report which I believe bears your signature, dated November 7, 1964, is that the form you speak of? That's a copy of it, not the original.

[221] A That has my signature on it. I don't know whether that was the form I filled out at that time or not.

Q Is that your handwriting on that form?

A Oh, yes. That's my handwriting.

Q And that's an Attending Physician's Report sent in to the District of Columbia Workmen's Compensation, office of the Deputy Commissioner?

A Yes.

Q Now, Doctor, under portion 11 where it asks for a statement in the patient's own words of how the accident occurred, could you read for us what your answer was on that form?

A Was treating patient for osteoarthritis of knees and wrist, right wrist.

Patient did not inform me that she had fallen. Stated she did not associate a fall with symptoms.

Q And do I understand correctly that she had been having these symptoms for some time prior to September, or November for that matter, of 1964?

A She had been having symptoms, yes.

Q Now, did she discontinue treatment with you, Doctor?

A Yes.

Q When is the last time you saw her?

A The last time I saw her was on October the 2nd, [222] 1964.

Q And what do your notes indicate the difficulty was on October the 2nd?

A The same. If anything, the knee was slightly worse.

Q Doctor, the symptoms that you saw, would those be symptoms which you would expect to see in the normal progression of arthritis of the type this lady had?

A They might commonly be associated with that, yes.

Q And might those symptoms occur, would you expect them to occur, absent any traumatic injury such as dropping a pot on your knee or something of that sort?

* * * *

A You mean without trauma?

Q Yes.

A Oh, yes.

* * * *

[223] BY MR. COHEN:

Q Doctor, how long have you known Mrs. Curry?

A Since about 1949.

* * * *

Q She's been a diabetic since '55?

A At least since '55, yes.

Q So from '55 to '64 you treated her for diabetes, is that right?

A Off and on, yes.

Q And the first time that the difficulties with the knee appeared was in April of '64?

A April '64, that's correct.

Q And on September 9th, you have a notation that [224] there was a real change, it was painful and swollen and it was worse.

A I think it was more swollen than it had been in July, June and July.

Q Could that have been as a result of trauma?

A It could have been, yes.

Q And it really got worse then and you noted one symptom thereafter which you didn't mention before, and that was stiffness.

A Yes, sir, that's correct.

Q Could that have been as a result of trauma?

A Yes, it could have been as a result of trauma also.

Q On October 2, '64—Please refresh my recollection. What happened on October 2?

A That was her last visit.

At that time she was on aspirin and cortisone.

Q And her knee was really bad?

A I wouldn't say it was really bad. It was slightly worse.

* * * *

[225] A I'd say slightly worse.

Q Could that have been as a result of trauma?

A Yes. The symptoms which a deranged knee can exhibit are limited. As I say, the same symptoms may be exhibited by either trauma or arthritis.

* * * *

Q You've always found her truthful, haven't you, Doctor?

A Very.

* * * *

[226] THE DEPUTY COMMISSIONER: Dr. Montgomery, from the report you were reading, apparently your last examination and treatment were on October the 2nd, 1964?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: And that, of course, included the condition of the right knee.

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: And you say up to that time she had not told you anything about a trauma, an accident to her knee?

THE WITNESS: That's correct.

THE DEPUTY COMMISSIONER: Until she came back to you some time later and asked you to fill out a report?

THE WITNESS: Correct, sir.

THE DEPUTY COMMISSIONER: And it is the report, I believe, of November the 7th, 1964.

* * * *

[227] THE WITNESS: Yes, sir, if it was dated that date, I would say that date—

* * * *

[238] SUSIE CURRY

* * * *

REDIRECT EXAMINATION

BY MR. COHEN:

Q After the accident, Mrs. Curry, when you went to see Dr. Montgomery who was your regular doctor for your diabetes or whatever else you were having, why didn't you tell him about the accident?

A When I first went there I was so nervous and all upset and hurting so bad, I didn't thought right then to tell him about it, the first time.

* * * *

A Because I was hurting so, and my heart, my heart was fluttering around and, I'm telling you, I get so nervous and all upset.

I was just nervous, that's why I didn't tell him the first time.

* * * *

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

COMPENSATION ORDER

REJECTION OF CLAIM

Case No. 4128-39

In the matter of the claim for compensation under the
District of Columbia Workmen's Compensation Act

SUSIE CURRY,

Claimant,

vs.

FLORIDA PRODUCTS CO., INC.,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on September 8, 1964 and for more than ten years prior thereto, the claimant above named was in the employ of the employer above named, whose address is 57 N Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An

Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Liberty Mutual Insurance Company;

2. That on or about September 1, 1964, the claimant, while performing services for the employer as a packer and while carrying a 20 to 25-pound metal pot, approximately 18 inches deep and 18 inches in diameter at the top, slipped and fell to the floor;

3. That on May 27, 1965, the claimant filed claim against the employer for benefits under the District of Columbia Workmen's Compensation Act, alleging that as a result of the accident on or about September 1, 1964, she suffered an injury to her right knee when it was struck by the pot she was carrying when she fell, as a consequence of which she allegedly has been totally disabled since September 9, 1964, and was hospitalized on November 10, 1964 for an arthrotomy of the right knee with a partial synovectomy, and excision of cartilage from the condyle of the femur and kneecap;

4. That a hearing upon the said claim was held on September 15, 1965; that at the said hearing the employer and the insurance carrier made objections to the claim, including the objections that the claimant failed to give written notice of the injury within the statutory period, and that the claimant did not suffer an injury to the right knee as a result of the accident;

5. That from the time of the accident and for a period of about two months thereafter, the claimant did not complain to her employer of an injury to her right knee or to any other part of her body as a result of the accident nor did she request her employer to furnish any medical services by reason of the accident; that immedi-

ately after the claimant fell, as found above, she continued to perform her regular duties for the remainder of that day and for several days thereafter; that the claimant was known to complain of and suffer from other ailments which were sufficient to result in absences from work; that the claimant did not give written notice of the alleged injury to her right knee to the Deputy Commissioner or to the employer within thirty days of the accident; that the employer did not have any knowledge of an injury to the claimant's right knee, as alleged, within thirty days;

6. That the claimant was afflicted with chronic degenerative osteoarthritis and chronic synovitis of the right knee, and chondromalacia of the patella and medial condyle of the right femur; that these conditions pre-existed the subject accident; that the orthopedist who performed surgery on the claimant testified that he had no independent recollection of securing from the claimant a history of an occupational injury to the knee and that it was several weeks after surgery, pursuant to an inquiry by the insurance carrier, that the said allegation was developed; that the said orthopedist also testified that the conditions of the right knee found at surgery had started at least six months prior thereto, and that there was no way of determining if such conditions were related to an injury of the knee or to the natural progression of the degenerative arthritis disease; that the claimant denied any previous trouble with or injury to the right knee and denied that she was ever treated by her private physician for the said conditions of the knee; that the claimant's denials of any trouble with or injury to the right knee prior to the accident were contradicted by the testimony of her private physician who treated her right knee on at least three occasions prior to the accident and on several occasions subsequent thereto; that the claimant did not relate any history of an occupational

injury to her right knee to any one of the aforesaid physicians until a period of about two months had passed since the accident; that although she suffered loss of wages beginning September 9, 1964, required and secured medical treatment for the right knee, and had been a recipient under the Act for an occupational injury on at least two occasions, the claimant did not request her employer for treatment for the knee or compensation for her wage loss; that on or about November 4, 1964, the claimant telephoned the insurance carrier and then for the first time made a request of the carrier for compensation and or medical treatment for her right knee; that in an untimely written notice of injury executed by the claimant on a form prescribed for such purpose and received at the office of the Deputy Commissioner on November 12, 1964, the claimant did not associate the condition of her right knee to a trauma by the pot when she fell; that the testimony of the claimant to substantiate her allegation of an injury to the right knee at the time of the accident was unreliable; that the conditions of her right knee which caused disability for work and required surgical treatment were the result of the natural progress of the degenerative arthritic disease; that the claimant did not sustain an injury to her right knee, as alleged, when she fell on or about September 1, 1964.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for compensation and medical benefits be and it hereby is **REJECTED** for the following reasons:

1. That the claimant did not give written notice of the alleged injury to the Deputy Commissioner and the employer within thirty days as required by the District of Columbia Workmen's Compensation Act.
2. That the claimant did not sustain an injury to her right knee, as alleged, when she fell while performing services for the employer on or about September 1, 1964.

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3. That the conditions of the right knee which resulted in disability and required medical services was the natural progression of a degenerative arthritic disease which was not causally related to the employment.

Given under my hand and filed at Washington, D. C. this sixth day of January, 1966.

Deputy Commissioner
District of Columbia
Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, the attorney for the claimant and the attorneys for the respondents at the last known address of each as follows:

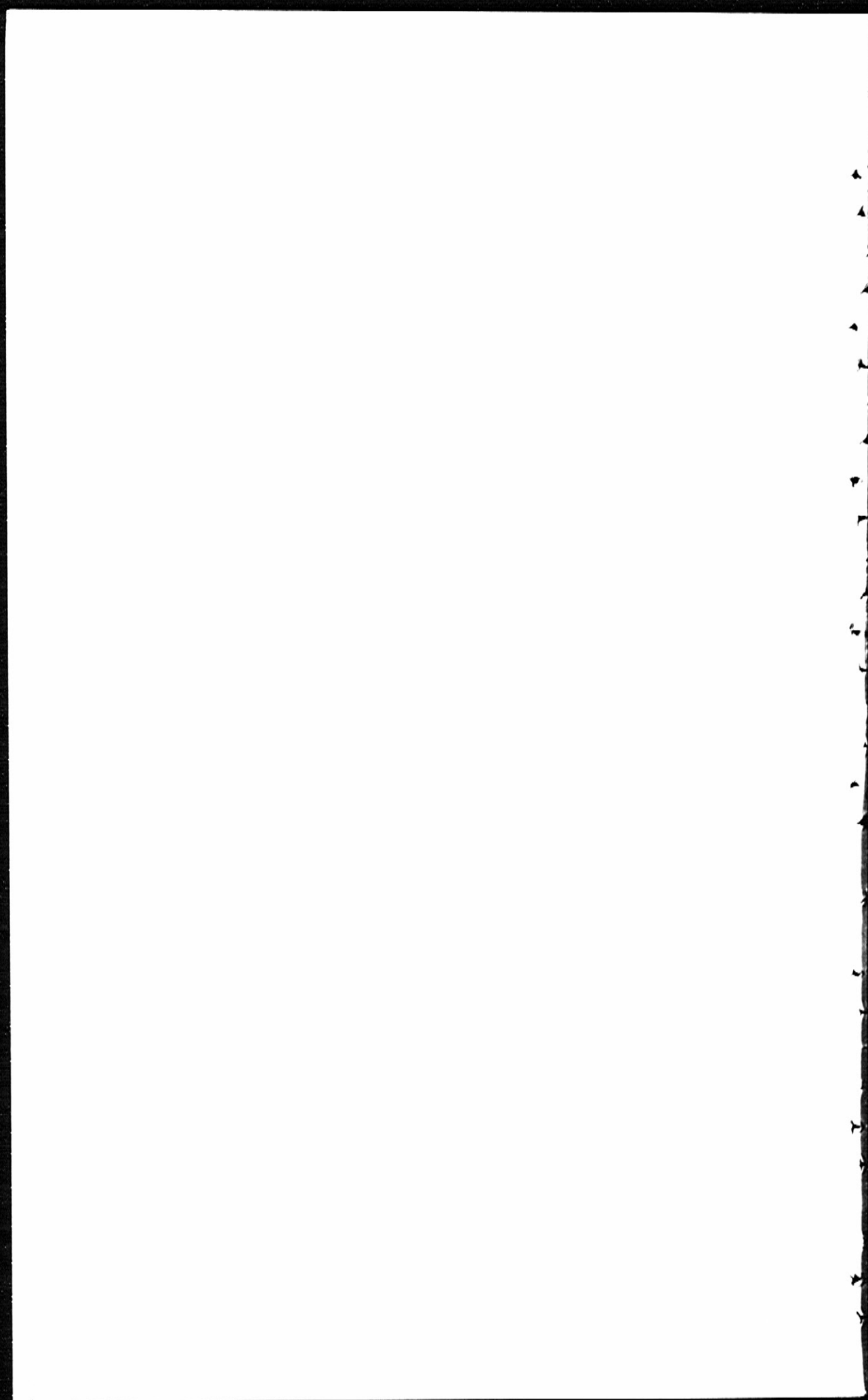
NAME	ADDRESS
Mrs. Susie Curry	1210 Taylor Street, N. W. Apt. No. 1 Washington, D. C.
Florida Products Co., Inc.	57 M Street, N. W. Washington, D. C.
Liberty Mutual Insurance Company	1730 M Street, N. W. Washington, D. C.
Hyman J. Cohen, Esq.	1331 G Street, N. W. Washington, D. C.
Hogan and Hartson Attorneys at Law	815 Connecticut Avenue, N. W. Washington, D. C.

Deputy Commissioner

Mailed: January 6, 1966

RELEVANT DOCKET ENTRIES

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 157-66

SUSIE CURRY,
1210 Taylor Street, N. W., Washington, D. C.,
Plaintiff,

v.

HERMAN ADLER, Deputy Commissioner,
Bureau of Employee's Compensation,
U. S. Department of Labor, Washington, D. C.,
Defendant.

COMPLAINT TO SET ASIDE COMPENSATION
ORDER REJECTING EMPLOYEE'S CLAIM

1. Jurisdiction of this Court is based upon provisions of Section 21 of the Longshoremen and Harbor Workers' Compensation Act (33 U.S.C. 921) as made applicable to employment in the District of Columbia by the provisions of Title 36, D. C. Code, Section 501.

2. The defendant is a duly appointed Deputy Commissioner for the District of Columbia Compensation District under the said Longshoremen's and Harbor Workers' Compensation Act.

3. Plaintiff filed a claim for compensation benefits for a disability due to a knee injury. Said disability was caused or aggravated by said injury sustained on or about September 1, 1964, arising out of and in the course of plaintiff's employment with Florida Products Co., Inc. in the District of Columbia. A hearing was held on said claim on September 15, 1965, and on January 6, 1966, the Deputy Commissioner issued a Compensation Order rejecting the claim for the reasons stated in the Order.

4. Said Compensation Order is not in accordance with law but is contrary thereto, and the Findings of Fact set forth in said Order are not supported by substantial evidence on the record considered as a whole.

5. The plaintiff claimed that she was injured when she fell on a slippery floor, and a big pot hit her right knee, but the employer contended that no such incident occurred. The Deputy Commissioner found that the accident occurred exactly as claimed by the employee. However, the Deputy Commissioner further found that the employer did not have any knowledge of the injury within thirty days. There is absolutely no support in the record for such a finding. On the contrary, in the record is a statement by the employer that he knew of the accident on September 21 (Employer's First Report: Earliest date foreman knew of accident, September 21).

6. The Deputy Commissioner made no finding that the employer was in any way prejudiced, and indeed the Deputy Commissioner ignored the subject of prejudice as to the delay, if any, in learning of the injury. The evidence of record is to the effect that the employer knew of this occupational injury when and as it occurred. The evidence of record is conclusive to the effect that the employer was not and could not have been prejudiced.

7. The Deputy Commissioner found that there was "an untimely written notice of injury executed by the claimant on a form prescribed for such purpose and received at the office of the Deputy Commissioner on November 12, 1964 . . .". The evidence of record is that the form (DCCA) was dated November 6, 1964, i.e. received at the office of the Deputy Commissioner on November 6, 1964. The Deputy Commissioner found that the conditions of claimant's right knee which caused disability for work and required surgical treatment were the result of the natural progress of degenerative arthritic disease and

that the claimant did not sustain an injury to her right knee when she fell. There is absolutely no support for such a finding. The evidence of record is to the effect that the injury aggravated a pre-existing condition; that said pre-existing condition did not disable plaintiff and that she worked and did her job regularly and steadily, as she had for this employer for twenty years; that the accident was the trigger that started the aggravation of the pre-existing condition and caused an occupational injury, osteoarthritis, loose bodies, chondromalacia of patella and medial condyle of femur, chronic synovitis.

9. The evidence of record, considered as a whole, cannot support the Deputy Commissioner's finding that claimant did not sustain an injury to her right knee, and that the condition of the right knee which resulted in disability and required medical services, including surgery, was the natural progression of a degenerative arthritic disease which was not causally related to the employment. The evidence of record can support only the findings that plaintiff sustained an injury to her right knee as a result of her work accident, of which the employer knew, as to which he had notice, and that if there was delay, the employer was not prejudiced; that said injury resulted in disability and required medical services including surgery.

WHEREFORE plaintiff prays that:

1. The file in case No. 4128-39, the record of all the proceedings before the Deputy Commissioner, including the Compensation Order, be filed herein and made a part of this Complaint.

2. The Compensation Order rejecting the claim be set aside and the case be remanded to the Deputy Commissioner for a Compensation Order consistent with the law and the facts.

3. Plaintiff have such other relief as to the Court may seem just and proper, together with the costs of this proceeding.

/s/ H. J. Cohen
HYMAN J. COHEN
Attorney for plaintiff

[Caption Omitted]

ANSWER OF DEFENDANT
DEPUTY COMMISSIONER

Defendant, Herman Adler, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1 and 2.

2. Admits the allegations contained in paragraph numbered 3 to the effect that plaintiff filed a claim for compensation benefits for disability due to an alleged knee injury, that a hearing was held on said claim before defendant on September 15, 1965, and that on January 6, 1966, defendant filed a compensation order rejecting the claim for the reasons stated in said order, but denies the allegation therein which alleges "said disability was caused or aggravated by said injury sustained on or about September 1, 1964, arising out of and in the course of plaintiff's employment with Florida Products Co., Inc. in the District of Columbia."

3. Denies the allegations contained in paragraphs numbered 4 and 9.

4. Neither admits nor denies the allegations contained in paragraphs numbered 5, 6, and 7, but instead refers

the Court to the compensation order filed in this case and to the transcript of the proceedings before the defendant deputy commissioner on September 15, 1965, which constitutes the entire record and contains all the evidence for purposes of the present action for review of the compensation order complained of.

5. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respects in accordance with law.

WHEREFORE, defendant deputy commissioner prays that the complaint be dismissed.

DAVID G. BRESS
United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

ELLEN LEE PARK
Assistant United States Attorney
Attorneys for Defendant Adler

[Certificate of Service Omitted]

[Caption Omitted]

MOTION TO INTERVENE AS DEFENDANTS

Florida Products, Inc. and Liberty Mutual Insurance Company move for leave to intervene as defendants in this action in order to assert the defenses set forth in their proposed answer, of which a copy is hereto attached, on the ground that they are the employer and Workmen's Compensation insurance carrier named as respondents in the plaintiff's claim for Workmen's Compensation and therefore the representation of the applicants' interest by existing parties is or may be inadequate and the applicants are or may be bound by judgment in this action.

HOGAN & HARTSON

By JAMES A. HOURIHAN
JAMES A. HOURIHAN
Attorneys for Florida Products,
Inc. and Liberty Mutual In-
surance Co. Applicants for
Intervention
815 Connecticut Avenue
Washington, D. C. 20006

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[Caption Omitted]

ORDER

Upon consideration of the Motion of the interveners, the Florida Products, Inc. and the Liberty Mutual Insurance Company, to intervene in this matter, its accompanying Memorandum of Points and Authorities, and there being no opposition filed, it is by the Court this 14th day of April, 1966,

ORDERED, that the Motion be and the same hereby is granted.

/s/ J. McGarraghy
United States District Judge

[Certificate of Service Omitted]

[Caption Omitted]

INTERVENERS' ANSWER

First Defense

The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

1. Interveners admit the jurisdiction of this Court and the allegation stated in paragraph 2 of the complaint.

2. The interveners admit that the plaintiff filed a claim for compensation benefits and that a formal hearing was held on September 15, 1965, with respect to plaintiff's claim. Interveners admit further that on January 6, 1966, the Deputy Commissioner issued a compensation order rejecting that claim on the grounds that the claimant failed to give proper written notice; that she did not sustain an injury to her right knee as alleged; and, that the conditions of the right knee which resulted in disability and required medical treatment was the natural progression of degenerative arthritis which was not causally related to the employment.

3. The remaining allegations contained in the complaint are denied.

HOGAN & HARTSON

By JAMES A. HOURIHAN
JAMES A. HOURIHAN
Attorneys for Interveners

[Caption Omitted]

DEFENDANT DEPUTY COMMISSIONER'S
CROSS MOTION FOR SUMMARY JUDGMENT

Defendant deputy commissioner, Herman Adler, Bureau of Employees' Compensation, United States Department of Labor, moves the Court to sustain his compensation order herein appealed by plaintiff, Susie Curry, and to enter judgment for the defendant, dismissing the complaint, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment on the record as a matter of law.

This motion is addressed to the complaint's assignments and specifications of error alleged to have been committed by defendant deputy commissioner, and is based upon the attached certified copy of the transcript of proceedings held before the defendant as Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on September 15, 1965, in the matter of Susie Curry, Case No. 4128-39, together with exhibits therein.

DAVID G. BRESS
United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

ELLEN LEE PARK
Assistant United States Attorney

Attorneys for Defendant Adler

[Caption Omitted]

1. PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.
2. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Defendant filed a Motion for Summary Judgment which, through inadvertence, was improperly entitled "Cross Motion." Plaintiff opposes defendant's Motion and plaintiff moves for summary judgment in her favor. In support thereof, she submits the following:

1. The plaintiff claimed that she was injured when she fell on a slippery floor and a big pot hit her right knee. The employer contended emphatically and aggressively that no such incident occurred. The Deputy Commissioner found that the accident occurred exactly as claimed by the employee.

2. However, the Deputy Commissioner further found (No. 5) that "the employer did not have any knowledge of" the injury within thirty (30) days. There is absolutely no support in the record for such a finding. On the contrary, in the record is a statement by the employer that he knew of the accident on September 21 (Employer's first report: Earliest date foreman knew of accident September 21, 1964).

3. The Deputy Commissioner made no finding that the employer was in any way prejudiced and indeed the Deputy Commissioner ignored the subject of prejudice as to the delay, if any, in learning of the injury. The evidence of record is to the fact that the employer knew of this occupational injury when and as it occurred. The evidence of record is conclusive to the effect that the employer was not and could not have been prejudiced.

4. The evidence of record is to the effect that the injury aggravated a pre-existing condition; that said pre-existing condition did not disable plaintiff and that she worked and did her job regularly and steadily, as she had for this employer for twenty years; that the accident was the trigger that started the aggravation of the pre-existing condition and caused an occupational injury, osteoarthritis, loose bodies, chondromalacia of patella and medial condyle of femur, chronic synovitis.

5. The evidence of record, considered as a whole, cannot support the Deputy Commissioner's finding that claimant did not sustain an injury to her right knee, and that the condition of the right knee which resulted in disability and required medical services, including surgery, was the natural progression of a degenerative arthritic disease which was not causally related to the employment. The evidence of record can support only the findings that plaintiff sustained an injury to her right knee as a result of her work accident, of which the employer knew, as to which he had notice, and that if there was delay, the employer was not prejudiced; that said injury resulted in disability and required medical services including surgery.

HYMAN J. COHEN
Attorney for Susie Curry,
Employee-Plaintiff

[Caption Omitted]

INTERVENORS' MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

The Intervenor, Florida Products, Inc., and Liberty Mutual Insurance Company, move this Court for a summary judgment in their favor on the ground that the order of the Deputy Commissioner is in accordance with law, as more fully appears in the defendant Deputy Commissioner's Motion for Summary Judgment, its attached Memorandum of Points and Authorities and Statement Pursuant to Rule 9(h), which by reference are incorporated herein and for such other reasons as are contained in the attached Memorandum of Points and Authorities.

Respectfully submitted,

HOGAN & HARTSON

By
JAMES A. HOURIHAN
Attorneys for Intervenor
815 Connecticut Avenue
Washington, D. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 157-66

Filed Apr. 7, 1967, Robert M. Stearns, Clerk

SUSIE CURRY,

Plaintiff,

vs.

HERMAN ADLER,

Defendant,

and

FLORIDA PRODUCTS, INC., and
LIBERTY MUTUAL INSURANCE COMPANY,
Intervenors.

PLAINTIFF'S OPPOSITION TO INTERVENORS'
MOTION FOR SUMMARY JUDGMENT

1. Defendant, HERMAN ADLER, Deputy Commissioner, filed a Motion for Summary Judgment incorrectly entitled "Cross Motion for Summary Judgment."
2. Plaintiff filed an Opposition to Motion for Summary Judgment, and a Motion for Summary Judgment.
3. Intervenors' filed a Motion for Summary Judgment and Opposition to Plaintiff's Cross Motion for Summary Judgment.
4. Plaintiff adopts as her Opposition to the Intervenors' Motion for Summary Judgment the pleadings formerly filed by plaintiff, i.e.:

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1. PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
2. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

/s/ H. J. Cohen
HYMAN J. COHEN
Attorney for Susie Curry
Employee-Plaintiff

Copies mailed to ELLEN LEE PARK, Assistant U.S. Attorney, U.S. Courthouse, Washington, D.C. and to HOGAN & HARTSON, 815 Connecticut Avenue, Washington, D.C. April 6, 1967.

/s/ H. J. Cohen

[Caption Omitted]

ORDER

Upon consideration of the motions for summary judgment filed herein by plaintiff, defendant and the intervenors and of oral argument of counsel, and it appearing that there is no genuine issue as to any material fact, that the record before the Deputy Commissioner does not support the findings of the Deputy Commissioner, and that plaintiff is entitled to judgment as a matter of law, it is by the Court this 4th day of May, 1967,

ORDERED that plaintiff's motion for summary judgment be and it hereby is granted, and it is

FURTHER ORDERED that the motions for summary judgment filed herein by defendant and the intervenors be and they hereby are denied, and it is

FURTHER ORDERED that the compensation order rejecting plaintiff's claim be set aside and that the case be and it hereby is remanded to the Deputy Commissioner to determine the nature and extent of plaintiff's disability.

/s/ Judge McGarraghy
United States District Judge

[Certificate of Service Omitted]

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given this 2nd day of June, 1967, that FLORIDA PRODUCTS, INC. and LIBERTY MUTUAL INSURANCE COMPANY, Intervenor above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of May, 1967 in favor of SUSIE CURRY, Plaintiff against said Intervenor and Defendant HERMAN ADLER.

Attorney for Intervenor
815 Connecticut Avenue
Washington, D. C. 20006

[Caption Omitted]

STATEMENT OF POINTS ON WHICH
INTERVENORS-APPELLANTS INTEND
TO RELY ON APPEAL

Pursuant to Rule 12(b) of the Rules of the United States Court of Appeals for the District of Columbia Circuit, the intervenors-appellants state that they rely upon the following points as the basis for their appeal:

1. That the District Court erred in granting appellee's motion for a summary judgment; and
2. That the District Court erred in denying appellants' cross-motion for summary judgment since the record of the formal hearing held by the Deputy Commissioner as

a whole contains sufficient evidence upon which he could base his conclusions that:

(i) the claimant did not give written notice of the alleged injury to the Deputy Commissioner and the employer within 30 days as required by the D. C. Workmen's Compensation Act;

(ii) that she did not sustain an injury to her right knee as alleged when she fell on or about September 1, 1964; and

(iii) that the conditions of her right knee which resulted in disability and required medical services were the natural progression of a degenerative arthritic condition which was not causally related to the employment.

HOGAN & HARTSON

By JAMES A. HOURIHAN
JAMES A. HOURIHAN
Attorneys for Intervenors-
Appellants
815 Connecticut Avenue
Washington, D. C.

[Certificate of Service Omitted]

[Caption Omitted]

JOINT MOTION FOR EXTENSION OF TIME

Comes now the appellee, Susie Curry, by and through her attorney, David Applestein, and moves this Honorable Court for an extension of time until August 25, 1967, within which to designate appellee's statement of joint appendix, and comes now the appellants, Florida Products, Inc. and Liberty Mutual Insurance Company, by and through their attorney, James A. Hourihan, and moves this Honorable Court for an extension of time for the filing of appellants' brief until twenty-five (25) days following the filing of the appellee's designation.

THIS MOTION IS HEREBY GRANTED.

/s/ D. L. B.
Chief Judge
Dated Aug. 1, 1967

This application is made because Hyman Cohen, the attorney who handled the proceedings before the Deputy Commissioner, Bureau of Employee's Compensation as well as the proceedings before the United States District Court for the District of Columbia, is out of the United States on a world tour, sponsored by the "World Conference on Peace Through Law." He left the United States on July 8, 1967 and will return approximately August 15, 1967, after attending the American Bar Association Convention in Hawaii. Upon his return, his appearance will be entered on behalf of the appellee, Susie Curry, and he will then proceed on her behalf in this Honorable Court.

/s/ David Applestein
DAVID APPLESTEIN
Attorney for Appellee, Curry
414 Woodward Building
Washington, D. C. 20005

/s/ James A. Hourihan by D. A.
JAMES A. HOURIHAN
Attorney for Appellants, Florida
Products, Inc., and Liberty
Mutual Insurance Co.
815 Connecticut Avenue, N.W.
Washington, D. C.

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Counsel for appellee, Herman Adler, has authorized me to state that he has no objections to the granting of any of the requests made in the foregoing motion.

/s/ David Applestein
DAVID APPLESTEIN
Attorney for Appellee, Curry

[Certificate of Service Omitted]

